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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

District Courts of the United States

WITHIN THE SECOND CIRCUIT.

By ROBERT D. BENEDICT.

VOLUME III.

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UNITED STATES

DISTRICT COURT REPORTS.

Southern District of New York.

NOVEMBER, 1868.

THE UNITED STATES *vs.* ETHAN L. WATSON AND OTHERS.

CRIMINAL LAW.—WHAT JUSTIFIES WITHDRAWING A JUROR.—MINUTES OF THE COURT.

A court of the United States has authority, in a criminal case, to discharge a jury from giving a verdict, whenever, taking all the circumstances into consideration, there is a manifest necessity for the act, or where the ends of public justice would otherwise be defeated; and it may do this without the consent of the defendant.

Where, after a jury had been empanelled in a criminal case, the trial was postponed to another day by reason of the illness of the District Attorney of the United States, and of the absence of witnesses for the prosecution, and, on the adjourned day, an application was made by the Assistant District Attorney that the cause go off for the term, on the same grounds as before, and thereupon the court directed a juror to be withdrawn, which was done, and the trial was postponed, (the minutes of the court not showing that the defendants consented to this course), and, when the indictment was again called, the defendants objected that such proceedings were equivalent to an acquittal:

Held, That the question must be disposed of as it would have been when the application was made to put the cause off for the term, if the defendants had then expressed their dissent from such a course;

That the minutes of the court must be the guide to the court as to what took place on that motion;

That, as it did not appear by the minutes that the defendants consented to the postponement, it must be held that they did not consent;

That, as it did not appear by the minutes that the illness of the District Attorney occurred after the jury was sworn, or that it was impossible for the Assistant District Attorney to conduct the trial, such illness did not show a manifest necessity for withdrawing a juror;

That, as the minutes did not show that the absence of witnesses was first made known to the law officers of the government after the jury was sworn, or that it occurred under such circumstances as to create a manifest necessity for withdrawing a juror, the position of the case entitled the defendants to a verdict of acquittal, when the motion to put the cause off was made;

That the proceedings on the former trial were equivalent to an acquittal, and the defendants and their bail were entitled to be discharged from all further liability in respect of the indictment.

THIS was an indictment found under the 45th section of the Internal Revenue Act of July 13th, 1866, and charged the defendants, in substance, with aiding and abetting in the concealment of thirteen barrels of distilled spirits, which had been removed from a distillery to a rectifying establishment which was not a bonded warehouse. The punishment for the offence was a fine of not less than $200 nor more than $1,000, or imprisonment for not less than three nor more than twelve months. The minutes of the court showed that, the indictment being pending therein, a trial of the indictment was, on the 10th of June, 1868, ordered on the motion of the district attorney; that on that day twelve jurors, whose names were set forth in the minutes, were sworn in the case; that the case was then adjourned to the next day; that on the next day, June 11th, the cause was called, and that, by reason of the illness of the district attorney, and the absence of witnesses for the United States, the trial was adjourned, and the jurors empanelled therein were continued until the 19th of June following; that on the 23d of June following, the trial being resumed, the assistant district attorney moved that the trial go off for the term, owing to the illness of the district attorney and the absence of witnesses for the prosecution; and that the court thereupon directed a

juror to be withdrawn, and the trial was accordingly postponed for the term. The indictment being called up again for trial, the defendants objected to any further or second trial, and moved for the discharge of the defendants and of their bail, on the ground that the above proceedings, set forth in the minutes of the court, were equivalent in law to an acquittal of the defendants on a trial of the indictment. The motion was made on the minutes of the court.

Samuel G. Courtney, (*U. S. District Attorney*,) *and Joseph Bell*, (*Assistant District Attorney*,) for the United States.

Henry L. Clinton and Clarence A. Seward, for the defendants.

BLATCHFORD, J. There can be no doubt that a court of the United States has authority, in a criminal case, to discharge a jury from giving a verdict whenever, in its opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or when the ends of public justice would otherwise be defeated, and it may do this without the consent of the defendants; but the court is to exercise a sound discretion on the subject, and to use the power with the greatest caution, under urgent circumstances, and for very plain and obvious causes. (*United States* v. *Perez*, 9 *Wheaton*, 579.) If the court may exercise this authority in a criminal case, without the consent of the defendant, in a case of manifest necessity, it may do so with the consent of the defendant, in a case which falls short of being one of manifest necessity. In the present case, the minutes of the court show that the reason for postponing the case from the 11th to the 19th of June was the same as that for postponing the case indefinitely on the 23d of June, and for directing a juror to be withdrawn—to wit, the illness

That, as it did not appear by the minutes that the defendants consented to the postponement, it must be held that they did not consent;

That, as it did not appear by the minutes that the illness of the District Attorney occurred after the jury was sworn, or that it was impossible for the Assistant District Attorney to conduct the trial, such illness did not show a manifest necessity for withdrawing a juror;

That, as the minutes did not show that the absence of witnesses was first made known to the law officers of the government after the jury was sworn, or that it occurred under such circumstances as to create a manifest necessity for withdrawing a juror, the position of the case entitled the defendants to a verdict of acquittal, when the motion to put the cause off was made;

That the proceedings on the former trial were equivalent to an acquittal, and the defendants and their bail were entitled to be discharged from all further liability in respect of the indictment.

THIS was an indictment found under the 45th section of the Internal Revenue Act of July 13th, 1866, and charged the defendants, in substance, with aiding and abetting in the concealment of thirteen barrels of distilled spirits, which had been removed from a distillery to a rectifying establishment which was not a bonded warehouse. The punishment for the offence was a fine of not less than $200 nor more than $1,000, or imprisonment for not less than three nor more than twelve months. The minutes of the court showed that, the indictment being pending therein, a trial of the indictment was, on the 10th of June, 1868, ordered on the motion of the district attorney; that on that day twelve jurors, whose names were set forth in the minutes, were sworn in the case; that the case was then adjourned to the next day; that on the next day, June 11th, the cause was called, and that, by reason of the illness of the district attorney, and the absence of witnesses for the United States, the trial was adjourned, and the jurors empanelled therein were continued until the 19th of June following; that on the 23d of June following, the trial being resumed, the assistant district attorney moved that the trial go off for the term, owing to the illness of the district attorney and the absence of witnesses for the prosecution; and that the court thereupon directed a

juror to be withdrawn, and the trial was accordingly postponed for the term. The indictment being called up again for trial, the defendants objected to any further or second trial, and moved for the discharge of the defendants and of their bail, on the ground that the above proceedings, set forth in the minutes of the court, were equivalent in law to an acquittal of the defendants on a trial of the indictment. The motion was made on the minutes of the court.

Samuel G. Courtney, (*U. S. District Attorney*,) *and Joseph Bell*, (*Assistant District Attorney*,) for the United States.

Henry L. Clinton and Clarence A. Seward, for the defendants.

BLATCHFORD, J. There can be no doubt that a court of the United States has authority, in a criminal case, to discharge a jury from giving a verdict whenever, in its opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or when the ends of public justice would otherwise be defeated, and it may do this without the consent of the defendants; but the court is to exercise a sound discretion on the subject, and to use the power with the greatest caution, under urgent circumstances, and for very plain and obvious causes. (*United States* v. *Perez*, 9 *Wheaton*, 579.) If the court may exercise this authority in a criminal case, without the consent of the defendant, in a case of manifest necessity, it may do so with the consent of the defendant, in a case which falls short of being one of manifest necessity. In the present case, the minutes of the court show that the reason for postponing the case from the 11th to the 19th of June was the same as that for postponing the case indefinitely on the 23d of June, and for directing a juror to be withdrawn—to wit, the illness

of the district attorney and the absence of witnesses for the United States. The minutes do not show any assent by the defendants to the withdrawal of the juror or any dissent from that course. I am satisfied that I must have understood the defendants, by their counsel, as consenting to the course that was pursued. Otherwise, the question of the effect of their not consenting would have been presented at the time; and they would have insisted then and there upon their right to a verdict of acquittal. No such verdict was asked for, nor was the question presented to the court as to what effect the want of consent by the defendants to the withdrawing of a juror would have as to a future trial. Although the counsel for the defendants may have urged their desire to proceed with the trial, and have dwelt on the hardship of the postponement, still I regarded them, and doubtless the district attorney did, in the absence of any motion on their part for the entry at the time of a verdict of acquittal, as in effect consenting to the withdrawal of a juror. If the district attorney did not choose to proceed with the trial after the jury were sworn and empanelled, the defendants had a right then and there to ask for a verdict of acquittal. If they had asked for such a verdict, the district attorney might, in preference, have gone on with the trial. Still the defendants were not bound to ask at the time for such a verdict. They have a right now to claim that what took place was in effect such a verdict. The fact that the court and the district attorney regarded the defendants as consenting to the course that was taken, ought not, in the absence from the minutes of the court of any statement that they consented, to conclude them. If the court, acting at the time on its understanding that the defendants in effect consented, had proposed to make in the minutes of the court an entry of such consent, it may very well be that the counsel for the defendants would have at once insisted on the right of the defendants to a verdict of

acquittal. Then the court would have been called upon to pass on the sufficiency of the reasons assigned in the minutes for withdrawing a juror—the illness of the district attorney and the absence of witnesses for the prosecution. The court must be governed as to the facts in this matter by its minutes. They were made by the clerk in the usual course of the business of the court, without the special attention of the court having been called to them, and without any motion having been made by the district attorney, at the time, to enter as a part of them that the defendants consented to the withdrawal of the juror. It would be very unsafe, and lead to endless disputes and probable injustice, for the court, in matters of this kind, to act on its own recollection, or on the affidavits of witnesses, especially after a lapse of time. If the parties to any suit or proceeding find that the minutes of the proceedings of the court kept by the clerk, and which are always open to inspection, are erroneous, the proper way is to move to correct them promptly, to comport with the facts. It must, therefore, be assumed, for the purposes of the present application, that there was no consent by the defendants to the withdrawal of the juror. The question then recurs whether the reasons assigned in the minutes of the court for withdrawing a juror show a manifest necessity for doing so, or that the ends of public justice would otherwise have been defeated. The question must be disposed of now as it would have been disposed of at the time the motion was made that the trial go off for the term, if the defendants had then expressed their dissent from such action. The illness of the district attorney, it not appearing by the minutes that such illness occurred after the jury was sworn, or that it was impossible for the assistant district attorney to conduct the trial, and the motion to put off the case for the term being made by such assistant, cannot be regarded as creating a manifest necessity for withdrawing a juror. So, too, as to the absence of wit-

nesses for the prosecution, it does not appear by the minutes that such absence was first made known to the law officers of the government after the jury was sworn, or that it occurred under such circumstances as to create a plain and manifest necessity justifying the withdrawing of a juror. The mere illness of the district attorney, or the mere absence of witnesses for the prosecution, under the circumstances disclosed by the record in this case, is no ground upon which, in the exercise of a sound discretion, a court can, on the trial of an indictment, properly discharge a jury, without the consent of the defendant, after the jury has been sworn and the trial has thus commenced. To admit the propriety of the exercise of the discretion on such grounds would be to throw open the door for the indulgence of caprice and partiality by the court, to the possible and probable prejudice of the defendants. When the trial of an indictment has been commenced by the swearing of the jury, the defendant is in their charge, and is entitled to a verdict of acquittal if the case on the part of the prosecution is, for any rea son, not made out against him, unless he consents to the discharging of the jury without giving a verdict, or unless there is such a legal necessity for discharging them as would, if spread on the record, enable a court of error to say that the discharge was proper. (*Wharton's Criminal Law, ed.* 1852, *page* 213.) It is impossible, within this definition, to lay down any inflexible rule as to what causes would, and what causes would not, be sufficient to warrant the exercise of the discretion which the court possesses. It is sufficient to say, that in no case to be found in the books has any such reason as is spread upon the record in this case been admitted, in the absence of the consent of the defendant, to be a proper ground for discharging a jury after they have been sworn and empanelled to try an indictment. To hold now that the record of the proceedings of the court on the former trial amounts to a verdict of acquittal, is to do just what

the court would have done at that time on the facts stated in the record. If I had any doubt as to the propriety of this course, I should resolve it in favor of the liberty of the citizen, rather than exercise what would be an unlimited, uncertain, and arbitrary judicial discretion. But the weight of all the authorities on the subject is, that the position of this case, as it stood when the juror was withdrawn, entitled the defendants, in the absence of their express consent to any other course, to a verdict of acquittal, and therefore entitles them to the action of the court, at this time, on their application to the same effect. An order will, therefore, be entered, declaring that the proceedings on the former trial are held to be equivalent to a verdict of not guilty, and discharging the defendants and their bail from further liability in respect of the indictment.

NOVEMBER, 1868.

IN THE MATTER OF JULIUS L. ADAMS, A BANKRUPT.

Examination of Bankrupt.

The fact that one creditor of a bankrupt has examined him under the 26th section of the bankruptcy Act, is no reason for withholding the same privilege from another creditor. But the register must regulate such examination so as to protect the bankrupt from annoyance, and oppression, and mere delay.

In this case an examination of the bankrupt at the instance of one creditor, under the 26th section of the bankruptcy Act, had been concluded. Another creditor obtained an order for a similar examination, on the return of which order the bankrupt objected to being examined, claiming that, after one examination had been concluded, the other creditors were estopped from exam-

ining him further. The register held that they were not so estopped.

BLATCHFORD, J. Every creditor has a right, under section 26, to examine the bankrupt on oath as to the matters specified in that section. Such examination enures to the benefit of all creditors. But the fact that one creditor has examined the bankrupt is no reason for withholding the privilege from another creditor. Yet the register must, in the exercise of a sound discretion, so regulate the time, and manner, and course of the examinations, as to protect the bankrupt from annoyance and oppression and mere delay, while at the same time full and fair opportunity is allowed to the creditors to inquire as to the matters specified in the 26th section.

NOVEMBER, 1868.

JAMES FARRELL *vs.* CHARLES H. CAMPBELL.

SEAMAN'S WAGES.—DESERTION.—CONTRADICTORY OATHS.—AGENT LIABLE AS PRINCIPAL.—DEFAULT.

Where it appeared that the defendant had made contradictory oaths:

Held, That that one must be taken as true which bore most strongly against himself.

Where an engineer was hired to serve on board of a steamboat by a man who appeared to have full control of her other business, and who did not state that he was an agent:

Held, That the engineer had the right to regard him as principal, and could hold him personally for his wages;

That any loss sustained by the vessel or her owners in consequence of the engineer's leaving the boat, could not be set up by such hirer as a defence against a suit for wages.

This suit was brought to recover wages for services rendered on board of the steamboat Sylph. A default having been taken in the cause, the respondent moved to open it, offering in support of it his own deposition.

For libellant, *Beebe, Donohue & Cooke.*

For respondent, *Hawkins & Cothren.*

BLATCHFORD, J. The motion to open the default is denied. The deposition of the respondent taken in the case on the 12th of November, 1868, shows clearly that he has no defence. The respondent, in his answer, swears that he never hired Farrell to serve as chief engineer, or in any other capacity, on board of the Sylph; whereas, in the deposition referred to, he says: "I hired the libellant Farrell; I, acting as agent for the owner, hired him. He was hired as chief engineer." These contradictions show how reckless the respondent is in regard to what he swears to. As a choice must be made between his oaths, that one must be taken as true which bears most strongly in favor of the libellant. It is not pretended by the respondent, in his deposition, that Farrell did not, in pursuance of such hiring, serve on board of the vessel, and do his duties well and faithfully so long as he remained. The defence set up in the answer is that the respondent did not own the vessel, but was merely an agent for her owners to attend to certain portions of their financial business, and that his character as agent was well known to Farrell at the time Farrell was hired on board of the vessel, and that the respondent never acted in any other capacity than as agent, in respect to the vessel, and not as principal; and that Farrell deserted the vessel after being a short time in service on board of her. The respondent, in his deposition, says that he was agent for the owner of the vessel, and as such had charge of the business of the vessel at the place where Farrell was hired, but he does not swear that Farrell knew or was informed, at the time of the hiring, of the fact of the respondent's agency. On the contrary, Farrell swears that the business of the boat was managed by the respondent, that he appeared to have

full control of the vessel and her business, and that he did not tell him (Farrell), when he hired him, that he (the respondent) was agent. Under these circumstances, the respondent's agency not being disclosed, and he managing and controlling the boat, and her business, and hiring Farrell, Farrell had a right to regard him as a principal, and can hold him personally liable for wages. Although the respondent may, in fact, have acted as agent for an undisclosed principal, so as to make such principal liable over to him the respondent, or even liable to Farrell, yet, *quoad* Farrell, for the purposes of this suit, the respondent was principal and not agent. As regards desertion, Farrell swears that he was hired at the rate of $125 a month, but for no fixed time; that he remained one day less than two months; that he did not agree to get a satisfactory substitute before leaving; and that he does not recollect that any thing was said about giving notice before leaving the vessel. These statements are in no way contradicted by the respondent, in his deposition. All that he says on the subject is, that when Farrell said he was going to leave the vessel, he, the respondent, told him he must not do so, and that if he did he would forfeit all his pay, under the terms of agreement made when, he, the respondent, hired him. The respondent does not testify that there were any terms other than naked hiring, nor does he state what the terms were to which he refers. Any loss or damage which the vessel or her owners may have suffered by reason of Farrell's having left when and as he did, if it can be laid to the account of Farrell, cannot be set up by the respondent. It can only be availed of by the owners when they are sued *in personam*, or the vessel is sued *in rem*. Besides, the answer sets up no such loss or damage. As to any adjudication by the military authorities at Hilton Head, nothing of the kind is set up in the answer, and it would be no defence if it were. On every ground the motion must be denied, with costs.

NOVEMBER, 1868.

THE STEAMBOAT AUSTIN.

COLLISION IN NORTH RIVER.—VESSEL AT ANCHOR.—LIGHTS.—APPORTIONMENT.—COSTS.

Where a towboat was coming down the Hudson river, with a heavy tow, and her pilot saw lights ahead, which appeared to be arranged as if on a tow coming up, but which, when he approached, were changed, but he was not then able to avoid the object, which proved to be two wrecking vessels fastened together by beams, and anchored over a wreck:

Held, That the towboat was in fault in approaching the object so near that she could not avoid it;

That the wrecking vessels were substantially a single object, and, whether they were called on to exhibit the light provided by article 7, or that provided by article 9, of the Act of April 29th, 1864, should have exhibited but one light, or, if they exhibited two, the two should have been similarly arranged;

That both vessels were in fault, and the damages must be apportioned, and the libellant must recover costs.

BLATCHFORD, J. This is a libel for a collision, filed by Justin F. Talmage and Thomas Kivlin, the owners of two wrecking vessels, for damages caused to those vessels by a collision which occurred between them and the steamboat Austin, at about seven o'clock in the evening of the 23d of November, 1865, in the Hudson river, off and a little above Teller's Point. The wrecking vessels were boats connected together by timbers running from one to the other. They were arranged over a sunken sloop, which they were employed in raising. One of the boats had a cabin in which the wreckers lived. That boat had a mast. The other boat was an open boat. The structure, composed of the two boats and the connecting timbers, was substantially a single object. It was anchored in its position, and was considerably over on the eastern side of the channel, and to the eastward of the middle of the river. The

weather was clear, so that lights could be seen two or three miles off, the tide was ebb, and the wind was northeast. The Austin was going down the river, toward New York, towing thirty-two boats, four on each side of her, and twenty-four attached to her by hawsers behind, in five tiers. That one of the wrecking vessels which had a mast, had a light in a lantern, suspended in the air some fifteen feet above the deck, and about the same distance from the mast, upon a rope which ran from the gunwale to the mast-head. In addition to this light, there was another light, in a movable lantern, on the deck of one or the other of the two wrecking vessels. This latter lantern was not intended to be stationary, nor was it in fact stationary, for, not long before the collision, it was moved from a position on one boat to a position on the other boat, but still it was kept visible to approaching vessels, equally with the suspended lantern. The pilot of the Austin testifies, that he saw the lights on these wrecking vessels at a distance, and that the appearance presented by them was such as to lead him to suppose that the object on which they were was a steamboat coming up the river with a tow, the arrangement of lights, as exhibited to his eye, being the same as was then shown on his own vessel, and used by other steamtugs when towing tows; that, when he had reached within about half a mile of the lights, there was a change in their positions relatively to each other, caused by the movement of the lower light; that he then concluded that the object must be something other than a steamtug towing; that he then saw that the only chance of avoiding a collision was to try and go to the eastward of the object; and that he sheered the Austin accordingly, and she passed in safety, but some of the boats in tow of her struck the wrecking vessels. It is clear, from the evidence, that the movement of the light from the deck of one of the two wrecking vessels to the deck of the other, was seen

by the pilot of the Austin, and led to his change of course. But the difficulty in the case, on the part of the Austin, is, that she ought not, with her unwieldy tow, subject as it was to the action of the tide and of the wind, to have approached so near to the object, whether it was supposed to be a tow, or something else, as to be unable to avoid it. It appears from the testimony of the pilot, that when he first saw the light at a distance, he could not tell what it was, and came nearer to it, and thought it was a tow, and remained of that opinion till the light on it moved. He ought not, in uncertainty, to have approached, with his bulky and helpless tow, so near. How he was going to avoid her, if she was a tow, does not appear, unless he relied upon her avoiding him. I cannot resist the conclusion that the Austin was in fault. But I think the wrecking vessels were also in fault. Whether it be claimed that the wrecking vessels were required to exhibit the light provided for vessels at anchor, by article 7 of the Act of April 29th, 1864, or the light provided for open boats at anchor, by article 9 of the same Act, they should have exhibited but one light, or, if they exhibited two, the two should have been similarly arranged. The actual arrangement was calculated to deceive an approaching vessel, and, I think, did contribute to induce the pilot of the Austin to think that the object carrying the lights was a steam-tug towing, and to approach nearer than he otherwise would.

There must be a decree apportioning the damages equally between the parties, and giving costs to the libellants.

W. J. Haskett, for the libellants.

Benedict & Benedict, for the claimants.

NOVEMBER, 1868.

IN THE MATTER OF MYRON ROSENBERG, A BANKRUPT.

ARREST OF BANKRUPT.—STAY OF PROCEEDINGS.—PROVABLE DEBT.

Where, after a bankrupt had filed his petition in bankruptcy, he was arrested under an order of a State Court, and, while under arrest, obtained from the bankruptcy Court an order staying proceedings in the action in which he was arrested, and the creditors, not having proved their debt in the bankruptcy proceedings, moved to set aside the stay:

Held, That their debt, being for merchandise sold at an agreed price, was provable under the 19th section of the bankruptcy Act, and was made by the 33d section none the less so, because it might, under that section, be a debt which could not be discharged;

That no consequences can be allowed, under the 21st section, to flow from proving a debt, which are inconsistent with the provisions of the 33d section. Therefore, so much of the 21st section as imposes a penalty for proving a debt, cannot be construed as applying to a debt which, by the 33d section, is not dischargeable.

That, under the 21st section, any action to recover a provable debt is to be stayed until a determination is had as to the discharge, whether the debt be one that will or will not be discharged.

Seymour's Case (1 Ben. 348) criticised and overruled.

BLATCHFORD, J. The bankrupt filed his petition in this case, as a voluntary bankrupt, on the 21st of May, 1868. At that time he was indebted to Zinn, Aldrich & Co., of New York, in the sum of $1,081.77, for merchandise sold by them to him. On the 22d of May, 1868, Zinn, Aldrich & Co. commenced an action against him in the Superior Court of the city of New York, to recover that debt. The complaint in that action sets forth the sale and delivery of the merchandise to the above amount, and the non-payment of the debt, and claims judgment for the amount. It sets forth nothing else. On affidavits showing that the debt was fraudulently contracted, the Superior Court, on the 23d of May, 1868, granted an order in

the action that the bankrupt be arrested therein, and be held to bail in the sum of $2,000. The bankrupt was arrested on the order, and gave the bail. He has not moved the State court to set aside or discharge the order of arrest. The action being still pending, the bankrupt, on the 10th of June, 1868, presented a petition to this court, setting forth the pendency of the action, that he had been arrested and held to bail on an untrue statement of facts, that the claim made in the action was a debt justly due by him, and was set forth in the schedule to his petition, and was provable under the bankruptcy Act, and that his discharge in bankruptcy would discharge the debt, and praying for an order staying all proceedings in the action on the part of the plaintiffs therein, except the perfecting of bail, until the question of his discharge in bankruptcy should be determined by this court. Such an order was made on the same day by this court. The plaintiffs in the action now move for an order setting aside and vacating the stay of proceedings. This motion is founded on an affidavit setting forth that the debt in question was contracted by the fraud of the bankrupt, and on copies of the affidavits on which the order of arrest was granted, and which state particularly the circumstances of the fraud. The bankrupt opposes the application, and introduces his own affidavit, denying the fraud and the allegations in regard thereto, contained in the affidavits on which the order of arrest was made. It does not appear that the debt has been proved in the bankruptcy proceedings. It is beyond doubt a provable debt under section 19, being for merchandise sold for an agreed price, and it is made by section 33 none the less provable, because it may, under that section, be a debt which cannot be discharged.

The stay in question was granted under section 21 of the Act. That section provides as follows: "No creditor proving his debt or claim shall be allowed to maintain

any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action and suit against the bankrupt; and all proceedings already commenced, and unsatisfied judgments already obtained thereon, shall be deemed to be discharged and surrendered thereby; and no creditor whose debt is provable under this Act shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt until the question of the debtor's discharge shall have been determined; and any such suit or proceedings shall, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of the discharge, provided there be no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge; and provided also, that if the amount due the creditor is in dispute, the suit, by leave of the court in bankruptcy, may proceed to judgment, for the purpose of ascertaining the amount due, which amount may be proved in bankruptcy, but execution shall be stayed as aforesaid." The ground on which it is urged that the stay of proceedings should be set aside is, that the provision of the 21st section for a stay of provable debts relates only to such debts as are dischargeable, and does not apply to such debts as are declared by section 33 to be not dischargeable.

It is difficult to give an entirely satisfactory construction to the provisions of the 21st section. We have, first, the case of a creditor who proves his debt. The penalty imposed upon him for proving his debt, is, that he is debarred from maintaining any suit therefor against the bankrupt. He is debarred from doing so not merely until the question of the bankrupt's discharge shall have been determined, but forever. He is declared to have waived all right of action against the bankrupt, and to have discharged and surrendered, by proving his debt, all proceedings already commenced

and all unsatisfied judgments already obtained thereon. This provision in regard to debts proved must be construed in connection with the clause of section 33 which declares that "no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary capacity, shall be discharged under this Act, but the debt may be proved, and the dividend thereon shall be a payment on account of said debt." No consequences can be allowed, under section 21, to flow from proving a debt, which are inconsistent with the provisions of section 33. Therefore, so much of section 21 as imposes a penalty for proving a debt, cannot be construed as applying to a debt which, by section 33, is not dischargeable. We have next, in section 21, the case of a creditor whose debt is provable. This includes provable debts which are proved as well as provable debts which are not proved, and, therefore, includes debts which are embraced in the preceding provision in regard to penalties for proving debts. Now the creditor in a provable debt, whether it is proved or not proved, is not to be allowed to prosecute to final judgment any suit therefor against the bankrupt, until the question of his discharge has been determined. If the debt is provable, but not proved, the only penalty on the creditor for being a creditor is, that his right of action is to be suspended until the bankruptcy court has decided as to the debtor's discharge. If the debt is proved, then to that penalty is added the further penalty of a waiver of all right of action forever against the bankrupt, and a discharge and surrender of all pending proceedings and unsatisfied judgments, provided the debt is a dischargeable debt. The provisions of section 21, thus far considered, are addressed quite as much to the courts of the States as to the bankruptcy tribunals, and are to be applied and enforced by the former quite as much as by the latter. The section then goes on to provide that "any such suit or proceedings," that is, any

suit or proceedings to recover a provable debt, whether proved or not proved, and, if proved, whether dischargeable or not, "shall, upon the application of the bankrupt, be stayed, to await the determination of the court in bankruptcy on the question of discharge, provided, &c." This provision is especially addressed to the bankruptcy court, and the stay provided for is to be, and is, in practice, granted by that court. The manifest object of the provision is to relieve the bankrupt, while he is proceeding in good faith to obtain his discharge, and until the question of his discharge is determined, and he either obtains it or is refused it, from being harassed by suits for the recovery of provable debts. If the amount of a debt is in dispute, the suit may proceed so as to put the debt in a condition of provability, and then it must stop. If a discharge is granted, then the bankrupt is able to plead the discharge in any suit that may have been stayed, and the stay ceases. When the discharge is pleaded, the question of the extent of its operation upon the debts of the bankrupt, and whether a particular debt is, or is not, discharged by it, comes up for determination by the court in which the suit is pending in which it is pleaded. If a suit be then brought for a debt which has been proved in the bankruptcy proceeding, and the discharge is pleaded, and it is shown, in reply, that the debt is within the exceptions in section 33, it is for the court in which the suit is brought, to decide whether, under section 21 of the Act, the proving of the debt deprives the creditor of the benefit of section 33. So, too, if a discharge is refused, the stay ceases, its object having been accomplished, and the bankrupt having had the opportunity, unharrassed by suits, to endeavor to obtain his discharge. What would be the effect, under section 21, of proving a debt, where a discharge is refused to the bankrupt, is a question that does not arise for consideration in this case. I only allude to it, as connected with

the embarrassment that is felt in arriving at any perfectly satisfactory construction of all parts of the 21st section. I am satisfied, however, that the good sense of the section is, that an action to recover a provable debt is to be stayed until a determination is had as to the discharge, whether the debt be one that will be discharged, or one that will not be discharged. I have heretofore taken a different view of this section (*Seymour's case*, 1 *Ben. R.* 348), and have, in some cases, instituted an inquiry into the dischargeability of a debt, with a view to staying a suit brought to recover it, if it were found by this court to be dischargeable, and to refuse such stay, if the debt were found to be not dischargeable. But, on fuller consideration, I think that the section cannot properly bear any other construction than the one I now give to it. The stay is a temporary thing. The discharge is the permanent thing. The object of the stay is to give time for putting into action the permanent bar to the debt. There is reason in staying suits for all debts which can be proved in bankruptcy, so that, when the suits proceed again, the bankrupt may, if he can obtain a discharge, have the additional defence it will furnish him. But there is no good reason why the bankruptcy court should enter, in advance of a discharge, upon the inquiry as to whether the discharge will, when pleaded in bar of a particular debt, operate to discharge that debt. That inquiry is one properly to be made only by the court in which a direct suit on the debt is pending, and whose determination will be a binding judgment on the question between the parties. Such an inquiry, by this court, made with a view to see whether it shall or shall not stay a suit, will not have the effect of making its determination *res adjudicata* between the parties, so as to preclude further inquiry by another court. Another controlling view suggests itself. A discharge may not be granted. There will then have been an expensive and profitless inquiry

as to the probable effect of a possible discharge. No such proceeding was intended by the statute.

I think it proper to say that this construction of the 21st section has no application to the last clause of the 26th section, in regard to the liability of a bankrupt to arrest. By the specific provision of that clause, the bankrupt is entitled to be relieved from arrest if the arrest is founded on a debt from which his discharge, if granted, would release him, and this court is required, so long as the question of a discharge is undetermined, to inquire whether the arrest is founded on such a debt.

As the debt in this case is a provable debt, the stay of proceedings was proper, and the motion to vacate the stay is denied.

Beach & Beman, for the creditors.

Benedict & Boardman, for the bankrupt.

NOVEMBER, 1868.

IN THE MATTER OF ABRAHAM NEWMAN, A BANKRUPT.

Tradesman.—Books of Account.

The question, what are proper books of account to be kept by a merchant or tradesman, is in each case a question of evidence.

Where a bankrupt, for a year before filing his petition, was engaged in the business of buying and selling furniture on his own account, having a shop where his goods were displayed and sold:

Held, That he was a merchant or tradesman, under the 29th section of the Bankruptcy Act.

Where a bankrupt kept no books but two memorandum books, from which he could not tell the amount of the business he had done, or the particulars and consideration of debts due to and by his principal debtors and creditors:

Held, That the bankrupt had not kept proper books of account under the 29th section, and a discharge must be refused.

In the Matter of Abraham Newman, a Bankrupt.

BLATCHFORD, J. The first specification filed in opposition to the discharge of the bankrupt sets forth that, during the whole of the year 1867, he was a merchant engaged in the purchase and sale of furniture on his own account, at No. 149 Bowery, in the city of New York, and yet, with the fraudulent intent of concealing from his creditors the true state of his affairs, he kept no books of account whatever during any of the said period. The 29th section of the bankruptcy Act provides, that no discharge shall be granted, if the bankrupt, being a merchant or tradesman, has not, subsequently to the passage of the Act, kept proper books of account. The Act was passed March 2d, 1867. The provision in question does not qualify in any manner the effect of the non-keeping of the books. It does not say that the non-keeping must be with intent to defraud his creditors or to conceal anything from his creditors. In the same section, in the case of destroying or making false entries in books, or removing or transferring property, the intent and purpose of defrauding creditors, or of preferring a particular creditor, or of preventing the property from being administered in bankruptcy, are made essential conditions. By the English bankruptcy statute, an intent on the part of the bankrupt to conceal the true state of his affairs must be coupled with a wilful omission to keep proper books of account, in order to warrant the refusal of a discharge. Undoubtedly, under the Act of 1867, if the non-keeping of any book or books be shown to have had no effect in concealing from creditors the true state of the bankrupt's affairs, that circumstance must have weight in determining whether such books as were kept were proper books. But the intent of the non-keeping of books is of no importance. The mere omission is the thing plainly interdicted. Therefore, so much of the specification under consideration as attaches an intent to the omission may be properly rejected as surplusage; and the allegation that the bankrupt kept

no books of account whatever during the period referred to, is equivalent to an allegation that he kept no such books of account as he was required by the statute to keep, that is, no proper books of account.

From the 1st of January, 1867, to the 1st of January, 1868, during which period many of the debts due by the bankrupt, as set forth in his schedule of debts, were contracted, he was engaged in business on his own account, buying and selling furniture, in the city of New York. He had a shop or store where his wares or merchandise were displayed and sold. He was, therefore, a merchant or tradesman, under the 29th section. His voluntary petition was filed on the 3d of February, 1868. On the 10th of September, 1868, the bankrupt testified, on his examination, that he did not keep any books of account at all while he was in the furniture business on his own account. The specifications in opposition to the discharge were filed on the 17th of September, 1868. The bankrupt was again examined thereafter, and, on the 12th of October, 1868, testified, that when, in his original examination, he stated that he did not keep books when he carried on business, he meant that he did not keep a regular set of books; that he cannot write and does not know how to keep books; that he can write his name only; that he can write a little German so far as to write his name, but not to keep books; that he kept a memorandum book, in which he made entries in German that he could understand, and that he relied upon that; that he did not keep a book-keeper because his business could not afford it; that he had lately found the memorandum book referred to; that at the time the petition and schedules were prepared that book was not shown to the counsel who prepared them, because it was then lost; that he told his counsel at that time that he did not keep any books of account, but only kept such memorandum book; that his schedules were made up from his memory of what people owed him, and the schedules of what he

owed were made out from bills in his possession; and that the memorandum book was kept in German, with, it may be, a few entries in English by his daughter. On the 17th of October, 1868, the bankrupt produced two memorandum books as being the only books that were kept by him. He was then examined in regard to those books. Being asked what was the nature of the entries in the books, he stated that when a man bought goods of him he put it down there. He stated, that the entries were in the handwritings of himself, his son, his daughter, and strangers when they bought goods of him; that every thing of his affairs was in those books; that the names of all purchasers to whom goods were sold and delivered were there; that some of their residences were there, and some not; and that the books contained entries of very few of his purchases in the furniture business. The books have been submitted to the inspection of the court, but the question whether they were the proper books of account required to be kept by the bankrupt must depend upon the testimony. After the books were produced, the bankrupt was asked, on his examination, whether he could tell what amount of business he did during the year 1867. He replied that he did not know, but that, as near as he could tell, it might be from one to five thousand dollars. In his examination on the 10th of September, he stated that one Rosenberg, who appears in his inventory of assets as a debtor to him for $887.50, owed him that amount for money loaned and furniture bought, but he did not know how much was for money loaned, or how much was for furniture bought; that, in regard to a claim in his inventory against one Riddle for $476.40, it was for furniture, but he could not tell the price of the furniture; and that, in regard to a claim in his inventory against one Jones for $2,280.76, it was for money lent at different times, but he could not tell the dates, and it might be a year and a half ago. All the items of assets in the inventory, nine in number,

and amounting to $5,544.09, are put down merely as due by nine persons. In regard to Rosenberg, Riddle, Jones, and three others, the debts due by which six amount in the aggregate to $5,405.09, their present residences are stated in the inventory to be unknown. The creditors were entitled to know what amount of business the bankrupt did during the year 1867, after the passage of the bankruptcy Act, nearer than a conjecture that it was from one to five thousand dollars. They were also entitled to know the particulars and consideration of the indebtedness due by Rosenberg, and the price of the furniture sold to Riddle, and the details of the money loaned to Jones. If the bankrupt had kept proper books of account, and if these memorandum books were such proper books of account as he ought to have kept, he would have been able to give the information asked on the points referred to. The fact that, after these books were produced, he could not tell more nearly than he did the amount of his business during the year 1867, is conclusive evidence that the books he kept were not proper books. The question of what are proper books must be in each case a question of evidence. What would be proper and sufficient books in one case would be improper and insufficient in another. In the present case, on the evidence, the books were not such proper books of account as ought to have been kept. It may perhaps be shown that they were proper, and I am disposed to allow an opportunity to the bankrupt to do so, if he desires to introduce further evidence on the point. At present, I refuse the discharge on the first specification, without passing on any of the other three.

S. Hirsch, for the bankrupt.

P. H. Vernon, for the creditors.

NOVEMBER, 1868.

IN THE MATTER OF WILLIAM H. LITTLE, A BANKRUPT.

JURISDICTION.—CARRYING ON BUSINESS.

Where a bankrupt, who filed his petition in the Southern District of New York, in December, 1867, was a member of a firm engaged in manufacturing cloths in New Jersey, which failed in October, 1866, and, for six months before the filing of the petition, he had resided in New Jersey, but had a desk in the office of his son in New York city, where he received and wrote letters, and kept books and papers, and was engaged in closing up the affairs of the concern, but did no other business and had no other place of business:

Held, That his petition was not properly filed in this district, and this court had no jurisdiction to grant a discharge.

THE discharge of the bankrupt in this case was opposed by a creditor, who specified as one of the grounds of his opposition, that the bankrupt did not reside or carry on business, for the six months next immediately preceding the time of the filing of the petition for his discharge, in the Southern District of New York. The petition, which was a voluntary one, was filed on the 10th of December, 1867, and described the bankrupt as "of the city of Elizabeth, in the county of Union, and State of New Jersey," and stated that "he has had a place of business, and carried on business, as a dealer in cloths, for six months next immediately preceding the filing of this petition, at 24 Church street, in the city of New York," within the Southern District of New York. The proofs in the case showed that the bankrupt was a member of the firm of Little & Dana, which had a manufactory of cloths in New Jersey; that the insolvency of that firm became known in October, 1866; that the assets of the firm, when it failed, consisted of woolen goods and machinery, the machinery being in New Jer-

sey; that the woolen goods were and continued to be in the hands of agents in New York and Philadelphia, the agents in New York being Collins, Atwater & Whitney; that neither the bankrupt nor his firm kept any books of account after July, 1867; that the firm never kept any porter, clerk, or employee in the city of New York; that the firm were manufacturers, and never called themselves merchants, and had a factory and an office in New Jersey; that, for the six months next immediately preceding the filing of the petition, the firm had desk room in the office of a firm of which the son of the bankrupt was a member, at No. 24 Church street, New York, and received letters by mail, addressed to them there, and wrote letters from there; that neither the bankrupt nor his firm had any other office or place of business; that their books and papers were at the office, at No. 24 Church street; that a tin sign, with the words "Little & Dana," was attached to the door of that office; that the firm ceased manufacturing on the 1st of May, 1867; that the business the bankrupt was engaged in at No. 24 Church street, from the 1st of May, 1867, was settling up the business of the firm, and receiving and writing letters; that no rent was paid for the desk-room or the use of the office; and that the bankrupt resided in New Jersey.

Davis, Doolittle & Wyman, for the bankrupt.

Sterne Chittenden, for the creditor.

BLATCHFORD, J. It is required by the eleventh section of the bankruptcy Act, that the voluntary petition of a bankrupt shall be addressed to the judge of, and filed in, the judicial district in which the bankrupt has resided or carried on business for the six months next immediately preceding the time of filing such petition, or for the longest period during such six months. In the present case, the bankrupt resided in New Jersey, and

he did not, in the sense of the Act, carry on business in New York during any part of the six months. His firm were manufacturers of woolen goods in New Jersey, not merchants. They failed in October, 1866. They made no goods after May 1st, 1867. Their goods were not in their own hands for sale, but were in the hands of agents. They kept no books of account for more than four months before the filing of the petition. They did not have any porter, clerk, or employee in New York, but only an office, in which to write and receive letters and keep books and papers, the use of which office was furnished to them as a gratuity. The fact that the bankrupt had no office or place of business elsewhere than in New York, and that he was in the habit of coming to New York to write and receive his letters there, and to settle up his old business there, at an office where he kept up on a sign the name of his firm, does not make out a carrying on of business in New York, within the sense of the Act. The whole effort on the part of bankrupt in the testimony appears to have been to show that the only place of business or office he had was in New York, and that he did not carry on business elsewhere than in New York, and then to insist that it follows that he carried on business in New York. This is a departure from the statute and from what the bankrupt understood to be necessary when he swore to his petition. In that he swears that he has "carried on business, as a dealer in cloths, for six months next immediately preceding the filing of this petition, at 24 Church street, in the city of New York." Now, whatever else the testimony shows, it proves that this allegation in the petition is wholly untrue. Not only did he not carry on business as a dealer in cloths, for the six months, at No. 24 Church street, but he did not carry on business at all in New York during the six months, in the sense of the Act. He ought to have filed his petition in New Jersey. The discharge is refused for want of jurisdiction in this court to grant it.

In the Matter of Louis Hyman, a Bankrupt.

NOVEMBER, 1868.

IN THE MATTER OF LOUIS HYMAN, A BANKRUPT.

Examination of Bankrupt.—Power of Register.

The proceedings before a register, in bankruptcy cases, are under the control of the register, and should proceed without unreasonable delay. No inflexible rule can be laid down as to postponements or adjournments.

Blatchford J. In this case, after objections to the bankrupt's discharge had been filed, the court ordered the testimony in the matter to be taken before the register. On such order proceedings were taken, and were several times adjourned, at the request of the attorney for the opposing creditor, on the ground of sickness or professional engagements elsewhere.

On request of the bankrupt, the register has certified the facts to the court.

The proceedings before a register are to be conducted by him with the exercise of a proper legal discretion, and, subject to that rule, are entirely within his control. If a party unreasonably refuses to proceed in a matter, the matter must proceed without him, and the register must see that it proceeds in whatever manner may be proper. No new or further order or rule on the subject is necessary. The registers have ample authority in the premises, and should exercise it to prevent unnecessary and unreasonable delays. No general inflexible law can be laid down in respect to postponements or adjournments by them. Every case must be treated on its own merits, with the exercise of legal discretion, and according to the best judgment of the register.

NOVEMBER, 1868.

THE UNITED STATES *v.* NICHOLAS HENRY.

PLEADING.—INDICTMENT.—INTERNAL REVENUE.—FRAUDULENT BOND.

The general rule is that, in an indictment for an offence created by statute, it is sufficient to describe the offence in the words of the statute. If the defendant insists upon greater particularity, it is for him to show that the case falls within some exception to the general rule.

In an indictment under the 42d section of the Internal Revenue Act of July 13th, 1866 (14 *Stat. at Large, p.* 162), for executing a fraudulent bond, it is not necessary to set out the particulars in which the bond is fraudulent, or the particular manner in which the payment of the tax was evaded, or in which the bond was used, or attempted to be used, in fraud of the revenue law, or in which the accused executed the bond or procured it to be executed, or connived at its execution.

Under the 27th section of that Act, the proper person to give the warehouse bond there provided for is the person who, under the 24th section, gives the notice to the Government that he is the person engaged in the business of a distiller, at the distillery in question.

BLATCHFORD, J. This is a motion in arrest of judgment and also for a new trial. The defendant has been convicted on an indictment founded on the 42d section of the Internal Revenue Act of July 13th, 1866 (14 *U. S. Stat. at Large*, 162). That section, so far as it applies to the present case, provides, that any person who shall execute any fraudulent bond required by law or regulations, or who shall fraudulently procure the same to be executed, or who shall connive at the execution thereof, by which the payment of any internal revenue tax shall be evaded or attempted to be evaded, or which shall in any way be used or attempted to be used in fraud of the internal revenue laws and regulations, on conviction thereof, shall be imprisoned, &c. The statute does not make the offence a felony. The first count of the indictment avers that the defendant, on a day and at a

place named, unlawfully, knowingly, and wilfully did execute, and fraudulently procure to be executed, and connive at the execution of, a certain bond, which said bond was then and there required by law and regulations to be given by one Raedle, Raedle then and there being the owner of a distillery, and then and there being the owner of a bonded warehouse provided by him for the storage of bonded spirits of his own manufacture, which said bond, so executed, as aforesaid, was then and there fraudulent, and by which said fraudulent bond the payment of a certain internal revenue tax, to wit, the tax on the spirits distilled by such person as such owner of a distillery as aforesaid, was evaded and attempted to be evaded, then and there, with intent to defraud the United States. The bond is set out *in haec verba*, and the count avers that the defendant then and there knew the said fraudulent bond to be fraudulent, against the peace, &c. The second count is in all respects like the first, except that, instead of the averment as to the evasion and attempt at evasion of the payment of a tax, it is averred, that said bond was then and there used and attempted to be used in fraud of the said internal revenue laws and regulations.

It is urged in support of the motion in arrest of judgment, that the indictment does not sufficiently describe the offence, and that it is defective in not setting forth in what particulars the bond was fraudulent, and how the payment of the internal revenue tax was evaded and attempted to be evaded, and how the bond was used and attempted to be used in fraud of the internal revenue laws and regulations, and how the defendant executed, and procured to be executed, and connived at the execution of the bond.

The offence specified in the statute is one created by the statute. It was not an offence at common law. The general rule is well settled, that, in an indictment for an offence created by statute, it is sufficient to describe the

offence in the words of the statute, and that, if the defendant insists upon a greater particularity, it is for him to show that, from the obvious intention of the legislature, or the known principles of law, the case falls within some exception to such general rule, but few exceptions to the rule being recognized. (*Wharton's Amer. Cr. Law, chap.* 5, *sec.* 8, *page* 132, *second ed.*; *United States* v. *Gooding*, 12 *Wheaton*, 460, 474; *United States* v. *Mills*, 7 *Peters*, 138, 142; *United States* v. *Staats*, 8 *Howard*, 40, 44; *United States* v. *Pond*, 2 *Curtis' C. C. R.* 265, 268.)

In the present case, the indictment, in charging the offence, uses all the words which the statute employs. It is not claimed that the words of the Act are not pursued, but it is claimed that the indictment should contain more than the words of the Act. In the case of *United States* v. *Gooding* (12 *Wheaton*, 460), the indictment was founded on the Act of April 20th, 1818 (3 *U. S. Stat. at Large*, 450), concerning the slave trade. It alleged that the defendant fitted out for himself, as owner, a certain vessel named, with intent to employ it in procuring negroes, &c. The offence was a misdemeanor. The objection was taken that such allegation was not a legal charge of an offence, and that it was necessary to specify in the indictment the particular equipments, in order that the defendant might have notice of the particular charge against him. The judges of the Circuit Court were divided in opinion on this question, and it was certified to the Supreme Court. In the opinion of the court (*page* 473), delivered by Mr. Justice Story, it is said: "It is contended that there ought to have been a specification of the particulars of the fitting out, and that it is not sufficient to allege the act itself without them. The indictment in this respect follows the language of the statute, and is as certain as that is. We cannot perceive any good reason for holding the government to any greater certainty in the averments of the indictment.

The fitting out of a vessel may and must consist of a variety of minute acts and preparations, almost infinite in their detail, and their enumeration would answer no valuable purpose to the defendant to assist him in his defence, and subserve no public policy. * * The particular preparations are matters of evidence and not of averment. * * In general, it may be said that it is sufficient certainty in an indictment to allege the offence in the very terms of the statute. We say, in general, for there are doubtless cases where more particularity is required, either from the obvious intention of the legislature, or from the application of known principles of law. At the common law, in certain descriptions of offences, and especially of capital offences, great nicety and particularity are often necessary. * * So again, in certain classes of statutes, the rule of very strict certainty has sometimes been applied where the common law furnished a close and appropriate analogy. Such are the cases of indictments for false pretences, and sending threatening letters, where the pretences and the letters are required to be set forth, from the close analogy to indictments for perjury and forgery. Courts of law have thought such certainty not unreasonable or inconvenient, and calculated to put the plea of *autrefois acquit* or *convict*, as well as of general defence at the trial, fairly within the power of the prisoner. But these instances are by no means considered as leading to the establishment of any general rule. On the contrary, the course has been to leave every class of cases to be decided very much upon its own peculiar circumstances. Thus, in cases of conspiracy, it has never been held necessary to set forth the overt acts or means, though these might materially assist the prisoner's defence. So, in cases of solicitation to commit crimes, it has been held sufficient to state the act of solicitation, without any averment of the special means. And in endeavors to commit a revolt, which is by statute in England made a capital offence, it has always been

deemed sufficient to allege the offence in the words of the statute, without setting forth any particulars of the manner or the means. These cases approach very near to the present, and if any, by way of precedent, ought to govern it, they well may govern it." These principles are held to be especially applicable to indictments for offences which are misdemeanors, or are not felonies. (*United States* v. *Mills*, 7 *Peters*, 138, 142.) The rule applied by the Supreme Court in *United States* v. *Gooding* is one applicable in all respects to the present case. The fitting out of a vessel with intent to employ her in the slave trade is a crime created wholly by statute, and its criminality depends always, in a material degree, upon the character of the fitments of the vessel. If the vessel is fitted out with appliances for engaging in the slave trade, an important step toward the crime is made out; and, in every trial for such a crime, the character of such fitments and appliances becomes a material issue. For that reason it was urged, that the fitments or equipments ought to be particularly specified in the indictment, in order that the defendant might have notice of the particular charge against him. But the court held that that was not necessary, and that a simple allegation of fitting out, in the words of the statute, was sufficient. So, too, it is no more necessary to set out in the present case the particulars in which the bond is fraudulent, or the particular manner in which the payment of the tax was evaded and attempted to be evaded, or the particular manner in which the bond was used and attempted to be used in fraud of the internal revenue laws and regulations, or the particular manner in which the defendant executed and procured to be executed and connived at the execution of the bond, than it is to set out the acts or means in cases of conspiracy, or the special means in cases of solicitations to commit crimes, or the particular manner or means employed in an endeavor to create a revolt.

It is not alleged in the present case that the defendant has suffered from any surprise, or mistake, or absence of witnesses, by reason of the omission of any averment in the indictment. If such a fact were established, while it would not affect the validity of the indictment, it would be a proper ground to urge in favor of a new trial. This court, while seeking to uphold the law and the rights of the government, will always sedulously endeavor to secure to every person indicted or tried for crime a full and fair opportunity to meet the allegations brought against him. No injustice is suggested in the present case. The trial was deliberate and full, the jury considered the guilt of the defendant established, and the court is entirely satisfied with their verdict.

In regard to the point made that the defendant, and not Raedle, was the owner of the distillery in question, the owner of the distillery and the owner of the warehouse, named in the 27th section of the Act of July 13th, 1866, as the proper person to give the warehouse bond there provided for, is the person who, under the 24th section of the same Act, gives the notice to the government that he is the person engaged in the business of a distiller at the distillery in question. That person in this case was Raedle, and not the defendant. Raedle was the owner *quoad* the government. It could know no one else. The defendant may have been the owner in a private sense, as between him and Raedle, but Raedle was the owner in a public sense. The evidence of the making of the returns by Raedle was in fact given on the part of the defendant, and was competent evidence under the first and second counts, and would have been competent if given on the part of the government.

The question as to the defendant's guilty knowledge of the worthlessness of the sureties to the bond was a question of fact for the jury. The evidence was, in the judgment of the court, sufficient to fully warrant the verdict.

In the Matter of The Kerosene Oil Company, a Bankrupt.

The motion in arrest of judgment and the motion for a new trial are denied.

B. K. Phelps and J. Bell, for the United States.

E. Cooke and E. Blankman, for the defendant.

Eastern District of New York.

NOVEMBER, 1868.

IN THE MATTER OF THE KEROSENE OIL COMPANY, A BANKRUPT.

INJUNCTION ON SUIT IN STATE COURT.—PROCEEDING BY BILL OR PETITION.—RECEIVER AND ASSIGNEE.

A Bankruptcy Court has jurisdiction to restrain parties who are proceeding in a State Court, by action commenced after an adjudication in bankruptcy, to enforce a mortgage upon property in the possession of the assignee in bankruptcy, which mortgage the assignee claims is void.

THIS was a proceeding, on behalf of the assignee in bankruptcy, against the New York Guaranty and Indemnity Company, to prevent them from enforcing, in the Supreme Court of the State of New York, a mortgage upon the real estate of the bankrupt. The facts were as follows:

The N. Y. Kerosene Oil Company was a manufacturing company existing under the "General Manufacturing Law" of New York.

On the 15th June, 1868, a petition in bankruptcy was filed in this Court, in the name of said Company, praying that it be declared a bankrupt, and on September 8th, 1868, Charles Jones was appointed assignee in bankruptcy.

In the Matter of The Kerosene Oil Company, a Bankrupt.

On the 29th April, 1867, the N. Y. Kerosene Oil Company made and executed a mortgage of its real estate situated in Queens county (described in the petition and mortgage), to the New York Guaranty and Indemnity Company, a corporation existing under special charter, to secure the sum of $100,000 and interest. This mortgage was duly recorded in the office of the Register of Queens County, on the 11th of May, 1867. It was properly executed and acknowledged by the President of the N. Y. Kerosene Oil Company and its Secretary, and was upon its face a valid mortgage.

The N. Y. Guaranty and Indemnity Company commenced its action in the N. Y. Supreme Court as mortgagee, for the foreclosure of said mortgage, and made the assignee in bankruptcy a party defendant, as having or claiming an interest in the premises, which accrued subsequently to the mortgage. In this last mentioned action an order of the Supreme Court was made (October 6, 1868), requiring defendants to show cause why a Receiver should not be appointed. This order was returnable October 12, 1868. On the application of the assignee it was adjourned to November, 2d, 1868. After such extension the assignee filed this petition, and obtained an order directing the mortgagee to stay his proceedings in the State Court.

The N. Y. Guaranty and Indemnity Company had not proved its debt in bankruptcy.

Wm. Allen Butler, for the Guaranty and Indemnity Company, cited the following authorities on the question of the power of the Court to issue the injunction: *Ex parte Christy*, 3 *How.*, 292; *Houston vs. City Bank*, 6 *How.*, 486; *Campbells's Case*, 6 *Int. Rev. Rec.*, 174; *Burns' Case*, 6 *Int. Rev. Rec.*, 182; *Donaldson's Case*, 6 *Int. Rev. Rec.*, 199; *Bowie's Case*, 1 *Bank. Reg.*, 185.

For the assignee, *B. F. Tracy.*

In the Matter of The Kerosene Oil Company, a Bankrupt.

BENEDICT, J. This is a proceeding in bankruptcy arising upon the petition of Charles Jones, assignee in bankruptcy, wherein he prays that a certain mortgage upon the real estate of the bankrupt, which has been assigned to him, and of which he has possession as assignee in bankruptcy, may be declared void, and that said real estate may be sold by said assignee under the order and decree of the Court, and the proceeds distributed according to law; and also that the holders of said mortgage, who, by an action commenced in a State Court, after the mortgagee had been adjudged bankrupt, and after the assignee had entered into possession of the property under the assignment in bankruptcy, are seeking to foreclose the mortgage, and to have a receiver of the property appointed by the State Court, may be restrained from further proceedings in said action.

The mortgagees having appeared, in obedience to an order to show cause why the prayer of the petitioner should not be granted, at the outset have called the attention of the Court to the question of the regularity of the proceedings to obtain the relief here sought by petition in the bankrupt proceeding, instead of by bill in equity, and also to the question of jurisdiction of this Court to stay proceedings in a State Court.

These two questions, which have been to a certain extent argued before me as preliminary to an order directing the mortgagees to answer the petition in form, I do not propose to fully decide upon a mere suggestion. My present opinion, however, is that the proceeding by petition—certainly so far as it prays for an injunction to stay the parties from proceeding in the State Court, and obtaining there the appointment of a receiver of this property—is regular. The practice in proceedings in bankruptcy, where not controlled by the statutes and rules of the Supreme Court, must be prescribed by the District Court sitting in bankruptcy. I find nothing in

the statute or the rules which requires proceedings in bankruptcy to be by bill, and see no reason why the proceeding by petition is not a proper method to obtain the relief here sought. It would seem that the examination into the validity and amount of claims made upon the property of the bankrupt, and the direction as to the sale of the property and disposition of the proceeds, constitute a part of the case in bankruptcy, and may all be adjudged in the prompt and convenient method of a proceeding in petition. (*The Chemung Bank vs. Judson*, 8 *N. Y.*, *p.* 226.) That staying proceedings to remove the property from the possession of the assignee to the possession of a receiver of a State Court is part of the bankruptcy proceeding seems clear, and it is sufficient to maintain the petition if any part of the relief prayed for can be thus obtained. In so far as this petition prays for an injunction, it does not differ from many other petitions, which have been adjudicated upon in this and in other District Courts. Upon the question of the jurisdiction of this Court to issue the injunction prayed for, it is my opinion that this Court sitting in bankruptcy has jurisdiction to restrain parties who are proceeding in a State Court by action commenced after the adjudication of bankruptcy to enforce a mortgage upon property in the possession of the assignee under the bankrupt proceedings, which the assignee claims is void and constitutes no incumbrance upon the land, and who are seeking, by means of the appointment of a receiver in the State Court, to withdraw from the possession and control of this Court property which is in the custody of its officer, and in process of distribution as part of the bankrupt's estate.

I am further of the opinion that the facts set forth in this petition make out a case requiring the interposition of this Court by its injunction, and that the stay heretofore granted should be continued until the hearing and determination of the issue which the petition seeks to raise.

There will, therefore, be an order continuing the stay, and directing that an answer to the petition be filed within ten days.*

NOVEMBER, 1868.

THE PHILADELPHIA AND READING RAILROAD CO. *vs.* JOHN T. BARNARD & SONS.

FREIGHT.—BILL OF LADING.—ASSIGNEE.

Where a cargo of coal, before its delivery from the vessel, had been sold by the shippers to one Merritt, who sold it to one Blanchard, and he sold it to one Bass, who received part of it, and paid to the owners of the vessel freight on what he received, and refused to receive any more, and Blanchard then sold the rest to the respondents, who received no bill of lading, but received the coal from the vessel, and gave a receipt for it upon the captain's bill of lading, and gave Blanchard two notes, one for the price for the coal, and one for the freight, which Blanchard agreed to see paid, but which he failed to pay, and died insolvent:

Held, That the respondents were liable to the owners of the vessel for the freight on the coal which they received.

Whoever receives cargo from a vessel under a bill of lading, in the absence of circumstances showing a different understanding, is liable for the freight.

It is not necessary that a bill of lading should be actually indorsed, or even delivered, to a buyer, to make him an assignee of it.

THIS was an action brought to recover $237.92 freight on a portion of a cargo of coal transported and delivered by the libellants under the following circumstances: L. T. Conner & Co., at Philadelphia, shipped 214 tons of coal on board the boat of the libellants, for which the ordinary bill of lading was issued, according to which the coal was to be transported to New York, and there delivered to the shippers or their assigns, he or

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* This case went up to the Circuit Court, which affirmed this decision as to the injunction, but held that the assignee must proceed by bill instead of by petition. The decision in the Circuit Court is reported in *Blatch. C. C. Rep., Vol.* 6, *p.* 221.

they paying freight for the same at the rate mentioned therein. The margin of the bill of lading contained a memorandum that the freight was to be paid to D. E. Moore, the agent of the libellants, at Trinity Buildings, New York. Under this contract, the coal was safely transported to New York, and delivered as follows: Twenty-one tons to one Bass, who paid to the libellants freight on what he received, but declined to receive any more on account of an objection to the quality, whereupon the balance, 179 tons, was delivered from the vessel's side to the defendants in this action, who thereupon gave a receipt upon the back of the Captain's copy of the bill of lading, acknowledging the receipt from the libellants of the 189 tons. It appeared that the coal, before delivery, had been sold by the shippers to one Merritt, by him sold to one C. A. L. Blanchard, by him sold to Bass; and when Bass threw up the purchase after receiving the twenty-one tons, Blanchard sold the rest to the defendants. The defendants objected at first to buying the coal, because coal was dull of sale, and they would be obliged to pay the freight at once; whereupon Blanchard agreed to see that the freight was paid, if the defendants would give him their note for the amount of it. This was done, and the defendants, after the receipt of the coal from the vessel, gave Blanchard their two notes, one for the price of the coal, the other for the amount of the freight, with the interest added, both of which notes were duly paid. No copy of the bill of lading was indorsed or delivered to the defendants, nor any other evidence of the purchase made.

For libellants, *Benedict & Benedict.*

For respondents, *Geo. W. Wingate.*

BENEDICT J. Upon the facts in this case which are not disputed, there can be no doubt of the libellants' right to recover their freight of the defendants. It is clear law

that whoever receives cargo from a ship under a bill of lading, in the absence of circumstances showing a different understanding, is liable to the ship for the freight. It is not absolutely necessary that a bill of lading should be actually indorsed, or even delivered to the buyer, to make him the assignee thereof. Other circumstances may be shown equally sufficient to show the real relationship of a party to the cargo. Here the defendants received the coal themselves from the vessel's side; they gave no notice to the master or any one that they did not receive it under the bill of lading. After its delivery, they gave to the master, upon the back of his copy of the bill of lading, a receipt stating that they had received the coal from the libellants. Under such circumstances, they cannot be permitted to say that they dealt only with Blanchard, and are strangers to the contract for the freight. As between them and the vessel, they became, under the circumstances, the assignees of the bill of lading. They dealt with the ship in that capacity and no other, and the receipt of the coal made them liable, as such, for the freight. Besides it is clear that the defendants understood themselves to be liable to the ship for the freight, for one of them testifies that he at first declined to buy the coal of Blanchard because coal was dull, and he knew he would have to pay the freight, which objection Blanchard obviated by agreeing to take their notes for the freight, and seeing they were not compelled to pay it. This was accepted, and after the coal was delivered and their liability for the freight fixed, they gave to Blanchard their note for the amount of the freight, with interest added, of all which the libellants knew nothing. This indicates clearly that the defendants understood their liability to the ship and relied upon Blanchard to save them from it. Their misfortune is to have relied upon a man whose death and insolvency made it impossible for him to protect them. There must be a decree in favor of the libellants for $287.92 with interest and costs.

Southern District of New York.

DECEMBER, 1868.

PHILIP FITZPATRICK, *et al. vs.* EIGHT HUNDRED BALES OF COTTON AND TWO HUNDRED AND EIGHTY-EIGHT BARRELS OF MOLASSES, LATELY ON THE SCHOONER GEORGE W. HYNSON.

VOLUNTARY STRANDING.—SEAWORTHINESS.—MASTER.

Where a three-masted schooner encountered a severe storm from the eastward, off Fire Island, in the course of which the mizzen sail was so torn as to make it useless, and it was found impossible to repair it, and the effect of its loss was that the vessel could not be kept up to the wind, but fell off into the trough of the sea, and, about ten o'clock at night, the master ordered the mainsail to be taken in to check her speed, and kept her off before the wind towards the New Jersey shore, hoping that, before he reached it, some change might take place, but the wind and sea increased, and, about one o'clock the next morning, on consultation, it was determined that, inasmuch as an attempt to bring the vessel's head to the wind would cause her to fall into the trough of the sea, and be thrown on her beam ends, when her decks would be swept, and all on board be lost, it was safer to run the risk of beaching her, and, accordingly, she was kept on, and ran ashore about an hour after, and proved a total loss, her cargo being almost all saved:

Held, That this was a case of voluntary stranding, and that the owners of the vessel were entitled to contribution from the cargo;

That a vessel equipped in a manner which renders her competent to encounter the ordinary perils of a voyage is seaworthy;

That the fact that the mizzen sail of the vessel gave out in the extraordinary storm, and that she had no spare mizzen sail, does not show that she was unseaworthy when she sailed;

That the master of the vessel acted with due deliberation and discretion, with no unreasonable timidity, with an honest intent to do his duty, and with a fair exercise of skill.

THIS was a libel to recover contribution, in general average, for the damage sustained by the libellants by the loss of the schooner George W. Hynson, owned by

them, and of the freight on her cargo. Such loss was claimed to have occurred by the voluntary stranding of the vessel by her master. The libel was filed against the cargo, which was saved, and was being transported the vessel on freight. The vessel was a three-masted schooner. She took on her cargo at New Orleans, and left there for Providence, Rhode Island, on the 28th of December, 1866. On the 21st of January, 1867, at about five o'clock P. M., when she was about fifteen miles south from Fire Island, on the shore of Long Island, she encountered a severe storm from the eastward, and was headed off on a south southwest course. As the wind and the sea increased, an attempt was made to take in sail, and, in taking in the mizzen sail, it was so torn by the wind as to require to be repaired before it could be further used. The other sails were taken in, so that the vessel ran under a two-reefed mainsail, and a jib with the bonnet off. The night was so dark, the weather so cold, the wind so violent, and the sea so high, that, after an attempt by all disposable hands to mend the sail, the effort had to be abandoned about nine o'clock P. M. The effect of the loss of the use of the mizzen sail was, that the head of the vessel could not be kept to the wind and she fell off into the trough of the sea, and was in danger of being thrown on her beam ends. The wind and the sea continued to increase, and life lines were stretched for the safety of the crew, as the sea frequently broke over the deck. About ten o'clock P. M., the master, after consultation with the mate, ordered the mainsail to be lowered, to thus check the speed of the vessel, and kept her off before the wind and the sea to the westward, towards the New Jersey shore. At that time he supposed himself to be from twenty-five to thirty miles distant from that shore, and he had no then present intention of running the vessel on shore there, but hoped that before reaching there, the wind would either go down or shift from the eastward, and allow him to change his course

from one towards the shore. Directed by her rudder, proper hands being kept at her wheel, she was kept away from the wind, and out of the trough of the sea, and on a westward course. The wind did not abate or shift, and the sea increased. It was storming, with rain, snow, and hail, and very dark, and, about one o'clock A. M., the master had another consultation with the mate. The occasion of that consultation was, that the vessel had been running before the wind for three hours, and was approaching the New Jersey coast. The result of the consultation was, that, in the then state of the wind and the sea, it was thought to be impossible to do anything else but keep the vessel running to the westward, before the wind and the sea, until she should run upon the beach, for the reason that any attempt to bring her head to the wind would cause her to fall into the trough of the sea and be thrown on her beam ends, when her decks would be swept, and all on board would be lost. It was known to the master that the shore was a sandy beach. Two men were kept at the wheel, and guided the course of the vessel directly before the wind, and towards the beach, until the last moment, so as to prevent her falling into the trough of the sea before reaching the shore, so as to ensure her reaching the shore, and so as to ensure her reaching it bow on, and not broadside on, in which latter event the breakers might have swamped her. The rest of the crew were sent into the rigging. About two o'clock A. M., the vessel neared the breakers, bow on. The men at the wheel left it and jumped into the rigging just as a heavy swell came which lifted the vessel over the outer bar and carried her high up upon the beach, which, when daylight came, was found to be Squam Beach. The vessel was secured by an anchor from listing to starboard towards the sea. She ran up so high that, at low water, it was bare ground in shore of the vessel. An arrangement was soon made with the Coast Wrecking Company to save the vessel and cargo for

seven *per cent.* of their value, they to be delivered to the master in New York. After work was commenced under this arrangement, an agent, sent by the owners of and underwriters on the cargo, arrived at the wreck, and sanctioned the arrangement, and concurred in the discharging of the whole of the cargo, and remained there until nearly all of it was discharged. The cargo was all saved, mostly in good order, except thirteen barrels of molasses. The vessel broke up and was lost, despite all proper efforts to save her. After being stripped she was sold, as she lay, for $316. Her value before was about $20,000. The freight and primage on the cargo, if delivered in Providence, would have been $3,902. The agent of the owners and underwriters of the cargo told the master of the vessel, at the wreck, that he was prepared and authorized to sign average bonds for the owners and underwriters of the cargo, and that the freight would be payable, less the cost of transportation from New York to Providence. Without the knowledge of the master or of the agents of the vessel, the agent in New York of the consignees of the cargo received there and forwarded to Providence all of the cargo except 276 bales of cotton, which were seized under the process in this suit. The consignees of the cargo paid the salvage expenses and charges on it.

The answer set up, in defence, that the vessel was not seaworthy, or competently manned or commanded for her voyage; thatno proper effort was made to pursue her voyage, or to prevent her and her cargo from being wrecked, or to take her into a place of safety; and that the disaster was due to the fault or neglect of the master or the poor condition of the vessel and her equipment. The liability of the cargo to contribute in general average for the loss of the vessel, or of her freight, was denied.

The libellants insisted that the case was one of voluntary stranding, constituting a general average loss of the

vessel and freight, and entitling the libellants to recover contribution therefor from the cargo saved; and that the vessel was seaworthy, and was properly navigated. On the part of the claimants it was insisted, that the stranding, if excusable, was not voluntary but compulsory, and that the vessel was not properly equipped or competently navigated.

E. H. Owen, for libellants.

C. A. Hand, for claimants.

BLATCHFORD, J. It is the law of this Court, as settled by the Supreme Court of the United States (*Columbian Ins. Co.* v. *Ashby*, 13 *Peters*, 331,) that the voluntary running on shore of a vessel in a case of such imminent peril that there is no other possible means of preserving the crew, the vessel and the cargo, the stranding being done to preserve the crew, the vessel, and the cargo, followed by a total loss of the vessel and the saving of the cargo, constitutes, on behalf of the vessel, a general average loss, to which the cargo saved is bound to contribute. In the case of *Barnard* v. *Adams* (10 *Howard*, 270, 303,) the same Court state the rule to be, that, where there is a danger in which vessel, cargo, and crew participate, and such danger is imminent and apparently inevitable, except by voluntarily incurring the loss of a portion of the whole to save the remainder, and there is a voluntary jettison of some portion of the whole, for the purpose of avoiding such imminent peril, and the attempt to avoid such imminent common peril is successful, the case is one for a general average contribution. It was urged, in the present case, on the part of the claimants, that, to constitute a voluntary stranding, the vessel must be subjected intentionally to an increased peril, and that, where she flees from instant and sure destruction, the election to strand her is a secondary result forced by un-

avoidable compulsion, and is not voluntary. This is a mistaken view of the law of the Federal Courts on the subject. In *Columbian Ins. Co.* v. *Ashby* it is held, that where, in the stranding, there is an intention to place the vessel and cargo, if practicable, in less peril, by an act which, though hazardous, is done to escape from a more pressing danger, and for the common safety, and the salvation of the cargo is accomplished thereby, while the vessel is lost, the case is one of voluntary stranding, in which the cargo must contribute, in general average, for the loss of the vessel. So, too, in *Barnard* v. *Adams*, it is held, that where there is imminent peril that the vessel will be driven on shore under such circumstances as to be inevitably wrecked, with loss of vessel, cargo, and crew, and such immediate peril is avoided by voluntarily stranding the vessel at a less dangerous place, and cargo and crew are saved uninjured, but the vessel is lost, the case is one of voluntary stranding, and one for contribution, in general average, by the cargo saved, to the loss of the vessel. In that case, it was urged, that if the common peril was of such a nature that the thing cast away to save the rest would have perished inevitably, even if it had not been selected to suffer in place of the whole, there could be no contribution. But the court overruled this view, and held that there could be no foundation for a voluntary stranding, except the compulsion of necessity to save vessel and cargo or one of them from an imminent peril which threatened their common destruction; that the compulsory choice between the loss of the whole and the loss of a part must exist, to justify the sacrifice of a part for the whole; and that, if the *jactus* were not indispensable in order to escape the common peril, the master would himself be liable for the consequent loss. In the case of *Rea* v. *Cutler* (1 *Sprague*, 135,) the doctrine of the case of *Columbian Ins. Co.* v. *Ashby* was applied, and it was held that, where the master adopted a course which seemed to him least perilous, and most conducive

to the common benefit, the loss by shipwreck being inevitable, but being capable of being met in more than one way, and with different degrees of peril to life or property, and in so acting the vessel was wrecked, the loss was a ground for general average.

Applying these principles to the facts of the present case, the stranding of the vessel was less perilous than an effort to keep her head to the wind, and to keep her away from the shore. Such an effort, on the evidence, would have caused her to go around no farther than into the trough of the sea, and there was in such a position imminent and apparently inevitable danger that her crew would have been swept away and lost, entailing a loss of vessel and cargo. Under these circumstances, the master adopted the course which was least perilous. He knew that the New Jersey shore was sandy, and afforded a probability of safety, and, after due and proper consultation, he directed the course of his vessel so as to give her and her cargo the benefit of the lesser peril and the chance of avoiding the greater one. There was, of course, a chance that, in not running before the wind, and in keeping off shore, the vessel might in some way have escaped the apparent danger from lying in the trough of the sea, but that chance the master threw away and elected not to take; and in doing so he exercised volition. There was a manifest intention on the part of the master, especially after the second consultation, to place the vessel and cargo in less peril by running the vessel on shore. That act, though hazardous, was done to escape from the more pressing danger, and was for the common safety. It is true that, when the master first began to run before the wind, the New Jersey shore was so far distant that his hope that the wind would die away or change before he should reach the shore was greater than his fear of being cast upon the shore. But, at the time of the second consultation, there was an honest belief that the vessel and cargo and

crew would be lost in the trough of the sea, if the vessel were not run on shore, and that there was less peril in running her on shore. Under this state of facts, the will of the master was exercised in avoiding the greater peril of lying in the trough of the sea, and in discarding whatever chance of safety existed in doing so, and in carefully guiding the course of the vessel so as to accomplish the result attained. The case, therefore, was one of voluntary stranding, calling for contribution, in general average, on the part of the cargo saved.

The defence that the vessel was not seaworthy when she left New Orleans is not made out. She was equipped in a manner which rendered her competent to encounter the ordinary perils of the voyage. (*Dupont* v. *Vance*, 19 *Howard*, 162, 167; 2 *Parsons' Mar. Law*, *book* 2, *chap.* 3, *sec.* 2, *page* 132.) The fact that the mizzen sail gave out in the extraordinary storm the vessel encountered, and that she had no spare mizzen sail, is not enough to make out unseaworthiness at the commencement of the voyage. I see no evidence of any deficiency in her equipment in other respects, or of any want of care or skill in her navigation. The master appears to have been a competent man, and to have acted in the emergency with due deliberation and discretion, with no unreasonable timidity, with an honest intent to do his duty, and with a fair exercise of skill. (*Lawrence* v. *Minturn*, 17 *Howard*, 100, 110.)

The freight, if lost, is to be regarded as a part of the loss to be contributed for. (*Columbian Ins. Co.* v. *Ashby*, 13 *Peters*, 331, 344.)

There must be a decree for the libellants in accordance with this decision, with a reference to a Commissioner, as an auditor, to adjust, and state, and report the average contribution due from the cargo saved. All other questions are reserved until the coming in of the report.

In the Matter of Robert C. Rathbone, a Bankrupt.

DECEMBER, 1868.

IN THE MATTER OF ROBERT C. RATHBONE, A BANKRUPT.

FRAUD.—CONCEALMENT OF BANKRUPT'S PROPERTY.

Where a bankrupt, who had formerly been a member of a firm engaged in the insurance brokerage business, which was transacted without capital, was taken into the employment of that firm, and continued for some time in that employ, taking a prominent part in the transaction of the business, and then, he being dissatisfied with one of the partners, an agreement was made whereby the bankrupt's wife paid to such partner $4,000, which he had paid for two-tenths of the business, and was herself made a partner in his place, receiving two-tenths of the profits, but not rendering any services, the object of that arrangement being to retain the services of the bankrupt to the firm:

Held, That, under the circumstances of the case, the arrangement was fraudulent, and the bankrupt was the true owner of the interest in question, which he had fraudulently concealed; and that, therefore, a discharge must be refused to him.

Fraud is hardly ever made out by direct evidence, but by the interweaving of circumstances.

Whether the $4,000 paid by the bankrupt's wife might be reimbursable to her out of the two-tenths of the profits paid to her, *quere*.

IN this case several specifications of opposition to the bankrupt's discharge had been filed. On the hearing, the Court held that the eighth specification was made out, but afterwards referred the case back to the register for further testimony, and the case now came again before the Court, on the whole testimony.

For the bankrupt, *J. K. Porter* and *J. H. White*.

For the creditors, *H. P. Herdman*.

BLATCHFORD, J. The principal contest between the parties is now, as it was before, in regard to the eighth specification, which avers "that the business of Rath-

bone, Brothers & Co., brokers, &c., in Broadway, New York, was started and built up by said bankrupt, and has so continued under his supervision to the present time, the yearly net profit whereof is now about $35,000 per year; that said bankrupt professes to receive only about one-tenth of the annual profits of said business as a clerk, and in lieu of salary, which amounts to about $3,600 per annum, while his said wife represents by purchase, or pretended purchase, for $4,000, a one-fifth interest in said business, worth about $7,000 per year, all of which business, except those portions actually and not fraudulently sold to others, are assets in the hands of said bankrupt, and should enure to the benefit of his creditors."

The petition in this case, which is a voluntary one, was filed on the 4th of September, 1867. The inventory sets out no assets except personal clothing of the value of $100. The claim on the part of the creditor, under the eighth specification, is, that the bankrupt has concealed and covered up an interest which he had, from the 1st of March, 1866, to the time of filing his petition, as a partner in the firm of Rathbone, Brothers & Co., which did business during that time as insurance brokers in the city of New York. The business of the firm was transacted without any pecuniary capital, and consisted in procuring insurance to be effected on property, for a commission reckoned by a percentage. The success of the business was dependent entirely on the personal exertions of those engaged in it, and there was no buying or selling of any article of traffic, or any user of money or property for hire or profit. The business was established by the bankrupt, in connection with one Hamlin, January 1st, 1855. On the 1st of January, 1856, the bankrupt's brother, Aaron H. Rathbone, joined them. About the 1st of January, 1857, Hamlin withdrew, leaving Aaron H. Rathbone in the business with the bankrupt, under the name of Rathbone Brothers.

In 1858, the bankrupt withdrew. In 1861, he became a clerk to Aaron H. Rathbone, in the insurance business, at a salary of $2,500 a year. On the 2d of November, 1863, a copartnership, by written articles, under the name of Rathbone, Brothers & Co., was formed between Aaron H. Rathbone, Henry C. Seward, Theodore H. Knox, and William C. Greig, to do a general insurance brokerage business, and to continue until January 1st, 1868. By the articles, each partner was required to give his diligent and faithful attention for the benefit of the copartnership; and the net profits of the business, after deducting all expenses, were to be divided on the first day of every month, in the proportion of three-tenths to Aaron H. Rathbone, three-tenths to Seward, two-tenths to Knox, and two-tenths to Greig. The bankrupt continued with the new firm, receiving his salary of $2,500 a year from his brother until January 1st, 1864, and from the firm from the latter date until October 1st, 1864, at which time he left the employment of the firm. On the 1st of March, 1866, he made an arrangement whereby he gave his services to the business of the firm, and received in return therefor one-tenth of the profits of the business, payable monthly. The profits of the business are shown to have averaged $35,000 per year, and it appears that Greig paid $8,000 to Aaron H. Rathbone for his two-tenths interest.

On the 1st of October, 1866, a change was made, out of which the controversy in this matter arises. In order to understand how the change came to be made, it is necessary to examine the evidence as to the position of the bankrupt in connection with the business. Seward, one of the firm, testifies, that while he was in the firm, which was till the 1st of January, 1868, the bankrupt acted as the ostensible business man and head of the concern; that the bankrupt was the most prominent one in the business; that he had more to say in managing the business and hiring clerks, particularly a clerk

named Hamlin, who was employed by the influence of the bankrupt, against the wishes of the witness and of Aaron H. Rathbone and Knox, and was accepted by the witness in order to retain the services of the bankrupt; that of the members of the firm, and the attachés of the office, the bankrupt exercised the greatest influence; that, Aaron H. Rathbone acted as the solicitor in the business of the firm, and the bankrupt did every thing else that was necessary; that the services of the bankrupt were of more value to the firm than those of any of its members or of any other person in its service; and that, in all business transactions, the bankrupt acted ostensibly as a member of the firm, except in signing some contracts or checks, and wrote letters and signed the firm name without his own name being attached. Henry J. Hopwood, who was a clerk to the firm from September 1st, 1863, till December 31st, 1867, testifies, that while he was in the employ of the firm, the bankrupt acted as the ostensible head of the concern, and all matters were referred to him, and nothing of any importance was done without consulting him. Such was the position of the bankrupt in the business. His compensation of one tenth of the profits, called a salary to him as a clerk, really made him a partner; for there was no risk or liability in the business, and there was nothing in the relations of the four nominal partners to the business, or to each other, or to the bankrupt, which made them any more partners in the business and the firm, by reason of their receiving fixed fractional portions of the profits, than the bankrupt was a partner. He received a fixed fractional portion of the profits. All gave their whole time to the business. In such a business as this was, calling the bankrupt a clerk on a salary was a mere sham. He was a partner, receiving one-tenth of the profits. The four nominal partners divided what was left, in the proportions before named.

This was the condition of things from March, 1866, to

October, 1866. The bankrupt knew the value of his services in the business. The witness Seward says, that the bankrupt is as good a fire insurance man as any in the city of New York. It would not be regarded as strange, therefore, if the bankrupt should be found unwilling to continue his relations with the business on the terms of an interest of only one-tenth of the profits. The change made in October, 1866, as evidenced by written papers executed at the time, was this: By an agreement dated October 16th, 1866, executed by Knox and by Juliet Rathbone, the wife of the bankrupt, Knox, in consideration of $4,000 paid to him by Juliet Rathbone, sold to her all his interest in the partnership of Rathbone, Brothers & Co., and in its business and property, and in the benefits to arise therefrom, from the 1st of October, 1866, and agreed that he would not, prior to January 1st, 1868, solicit or receive business or employment, as an insurance broker, from any of the persons or firms for whom the said copartnership then transacted business as insurance brokers, except those named in a written consent, bearing even date therewith, signed by Aaron H. Rathbone, Greig and Seward. By an agreement dated October 16th, 1866, executed by Aaron H. Rathbone, Greig, Seward, and Knox, the first three consented to such transfer to Juliet Rathbone, and released Knox from all obligations and duties as a member of the firm from that date, and accepted Juliet Rathbone as a member of the firm in the place of Knox; and Knox covenanted with them that he would not, prior to January 1st, 1868, solicit or receive business, as an insurance broker, from any persons or firms for whom the said copartnership then transacted business as insurance brokers, except certain ones named, eleven in number; and they covenanted with Knox that they would not, prior to January 1st, 1868, solicit or receive business from those eleven, such agreement to take effect from October 1st. By an agreement dated October 16th,

1866, executed by Aaron H. Rathbone, Greig, Seward, and Juliet Rathbone, it was recited, that Juliet Rathbone had been substituted and accepted as a member of the firm in the place of Knox, but was not required to render any personal service in the business of the firm; and it was mutually agreed that the net profits of the business of the firm from the 1st of October, after deducting all expenses of conducting the same, should be divided on the first day of each month after that date as follows—three-tenths to Aaron H. Rathbone, three-tenths to Seward, two-tenths to Greig, and two-tenths to Juliet Rathbone. It was also provided in that agreement, that, in case of the death of either of the partners prior to the 1st day of January, 1868, the executors or administrators of the deceased partner should be entitled to the share of profits from time to time which such partner would have been entitled to if living. There was no like provision in the original articles of copartnership of November 2d, 1863. By an agreement dated October 16th, 1866, executed by Rathbone, Brothers & Co., and the bankrupt, it was agreed as follows: "First. Rathbone, Brothers and Company employ said Robert C. Rathbone as their clerk, from the first day of October, 1866, until the termination of their partnership, to wit, the first day of January, 1868, and shall pay him for his services a salary or compensation which shall be equal to one-tenth of the profits of their business, the same to be ascertained and paid on the first day of each month. Second. Robert C. Rathbone shall, during the continuance of said copartnership, devote his entire and faithful attention and services to the business of said copartnership."

What were the reasons which induced the change evidenced by these papers? Seward says: "There were several reasons. Amongst them, there was a difficulty between Gen. Hamlin and Mr. Knox. That and other things led to a serious difficulty between Mr. Robert

C. Rathbone and Mr. Knox, and, in order to retain the services of Robert C. Rathbone, it became necessary that Mr. Knox should leave." General Hamlin was a clerk with the firm. Seward, when asked what fact influenced him in desiring Juliet Rathbone to take the interest, she being a woman, who could yield no services, says: "In order to have the services of Robert C. Rathbone." He was asked, what influenced the firm in making the agreement with Juliet Rathbone, in not requiring her to render any personal service in the business of the firm, as he understood it at the time from the rest of the partners. He answered, that it was because it was their interest to do so in keeping the services of Robert C. Rathbone, and that that was the chief object in all their conversations together at the time. He was asked, whether, when Juliet Rathbone was taken in as a member of the firm, any change was made in the compensation which the firm paid Robert C. Rathbone. He answered: "Not directly, but indirectly we gave up one man's services." He was asked: "Did Robert C. Rathbone, after his wife became a partner, render any other, greater or different services from what he did prior to her becoming a partner?" He answered: "I can't say that he did. He might have worked a little more cheerfully, and things did go a little more pleasantly." He was asked: "State how, by giving up one man's services, the firm paid to Robert C. Rathbone a larger compensation than they previously did." He answered: "I stated that they did indirectly, as Mrs. Rathbone received the same interest that Mr. Knox formerly received, without giving her services, and we did not have the benefit of Mr. Knox's services." The following testimony was then given by the witness Seward, on his cross examination by the counsel for the bankrupt: "*Q.* Did you personally desire Mr. Knox to leave the firm? *A.* I did, in order to retain Robert C.

Rathbone's services. *Q.* Was that the sole and only reason? *A.* No, it was not. *Q.* State what other reasons prompted you to desire that Mr. Knox should withdraw from the firm. *A.* To have replaced him by a more active member of the firm. *Q.* Is that all? *A.* When the first trouble came up—it was because Mr. Knox didn't attend to his business, and that trouble was between Mr. Knox and Mr. Robert C. Rathbone—and I found I was going to lose Robert's services, I agreed to this new arrangement or partnership. *Q.* Was you, as a member of the firm at the time, dissatisfied with the manner in which Mr. Knox did his business? *A.* Yes, sir, there's no doubt about it. *Q.* Was not that one of the reasons that prompted you to get him out of the firm? *A.* Yes, sir. *Q.* How long had you expressed yourself dissatisfied before he did leave? *A.* I objected to his ever coming as a member of the firm. It was entirely through Mr. Robert C. Rathbone's influence over me that he ever became a member of the firm.. *Q.* You was, then, dissatisfied from the start? *A.* Yes, sir, from the start of the copartnership, and soon after his coming there as a clerk. *Q.* Was you pleased when he left the firm? *A.* In a business point of view I was. *Q.* You stated that, after Knox left, Robert C. Rathbone received indirectly more for his services than he had previously been receiving. Was this additional compensation paid to him in money? *A.* I can't answer that, because it is contrary to my answer which the counsel for the bankrupt refers to. *Q.* Did the firm pay Robert C. Rathbone, directly or indirectly, in money or otherwise, a greater compensation after his wife became a member of the firm, than they did prior to her becoming a member of the firm? *A.* No, I don't wish to say that the firm paid him any more in money after she became a member of the firm than they did before, but, in explanation of my former answer, which the counsel is criticising, I wish to say we lost one man's services in

order to retain Robert C. Rathbone. *Q.* Was you satisfied to lose the one man's services in order to get him out of the firm? *A.* No, sir." The effect of this evidence is, that the witness, as a member of the firm, was not satisfied with Knox, and desired to replace him with a more active and attentive person. The bankrupt, too, had trouble with Knox, and would not stay unless Knox were to leave. That was all very well. Why not, then, replace Knox by an active partner and one more active and efficient than Knox? Because the bankrupt interfered and threatened to deprive the firm of his services unless his wife were admitted to take Knox's place, without rendering any services herself, and without any person being supplied by her, or otherwise, to render, in consideration of her two-tenths share in the profits, the services which had been previously rendered by Knox. She had at her disposal $4,000 of her own money, inherited by her from deceased relatives, which she paid to Knox, and the transaction was consummated. From that time, out of every $100 of profits, the bankrupt first received $10. Of the remaining $90, his wife received $18, Greig $18, Seward $27 and Aaron H. Rathbone $27. Thus the bankrupt and his wife together received $28, out of every $100 of profits—an aggregate larger than that received by any one member of the firm, and one which his services, on the evidence, well deserved, and which the firm yielded rather than lose his services.

Knox testifies, that he paid $4,000 for his two-tenths interest, to Aaron H. Rathbone, on the 1st of January, 1863. He also says, that the bankrupt's one-tenth was paid to him before any distribution of the profits was made among the members of the firm. He also gives this testimony as to the reasons for his sale to Juliet Rathbone: "*Q.* What induced you to sell out your interest in the firm to Juliet Rathbone? *A.* There were a variety of reasons. The immediate cause was a disagreement between Robert C. Rathbone and myself,

which culminated about three months before I left the firm; but, during that three months, I believe, we did not exchange a word. That, of course, made it unpleasant in our business relations. Then, at the same time, there was a probability of a falling off of business, in consequence of an opposition by insurance companies to brokers, which might tend seriously to damage the business, and I thought I would sell out. I mention that, because it was used as a reason by Mrs. Rathbone why she should not pay a larger sum than she did pay. I do not mean to say that Mrs. Rathbone personally used the expression, but it was the subject of general discussion at the time, that the business was not so valuable as might be considered, in consequence of the anticipated action of the insurance companies, and it had a similar influence on my own mind. *Q.* Who were the parties to the general discussion you have named? *A.* Mr. Seward, Mr. Greig and myself. I believe Robert C. Rathbone had no discussion or negotiation with us on the subject." There is nothing in this testimony inconsistent with that given by Seward. It only serves to show how Knox was made use of to accomplish the object of giving to the bankrupt an interest in the firm commensurate with the value of his services. According to the evidence, he brought in clerks whether the partners were satisfied or not, and made and unmade partners as he pleased. He quarrelled Knox out, and forced his wife on the firm under the terms stated, by threatening to leave himself. Hopwood, when asked if he knows through whose immediate influence Knox left the firm, says: "All I know of that is this, that up to about a year and a half ago or two years Mr. Knox and Mr. Robert C. Rathbone were on very intimate terms, but after that they were seemingly not so friendly and Mr. Knox sold out his interest in the firm, but at whose suggestion I don't know."

Greig gives this testimony: "*Q.* State, if you know,

how and why Theodore H. Knox left said firm. *A.* Because of a disagreement between him and the members of the said firm, which was likely to result in an injury to our business, and, after a negotiation, he then offered to sell out. Not wishing to have any stranger or other person, who might become acquainted with our customers, come into the firm, we preferred him to sell his interest to some one who would become a silent partner and we would do the additional labor ourselves. Mrs. Juliet Rathbone's name was then suggested, and he agreed to sell it to her and we agreed to let him do so, and that was the way in which those papers came to be executed." He also says that the partners thought that Knox did not do his duty ; and that he, the witness, did not wish to purchase Knox out, as he did not think there was going to be much if any profit over and above the amount asked for Knox's interest. There is nothing in the testimony of Greig that contradicts the evidence of Seward, that Mrs. Rathbone was brought in because the services of the bankrupt could not otherwise be retained.

The testimony of Seward was given on the 31st of July, and the 1st, and 4th, of August, 1868. The bankrupt was cross-examined on his own behalf on the 11th of August, but he does not any where in his evidence contradict the testimony of Seward, or refer to it in any way, or state how or why Knox left the firm, or why Juliet Rathbone was brought in. Aaron H. Rathbone was examined as a witness as lately as the 13th of October, and is equally silent with the bankrupt. In a case as severely contested as this, and where the point is so vital, the omissions referred to cannot be regarded as accidental or inadvertent.

It is urged on the part of the bankrupt, that the money which Juliet Rathbone paid to Knox was her own money, obtained by inheritance; that the bankrupt never received any portion of the profits on her

interest, but they were all paid to her personally from month to month; and that, therefore, her title to the interest she purchased in the firm and to the profits therefrom is unquestionable. The case is sought to be put upon the point, that this was a proper and legitimate investment by her of her own money, and that the share of profits bought by her became her property, as against her husband and his creditors. If there were nothing else but an investment of her money, there would be no difficulty in the matter. But the transaction was devised with great ingenuity and skill, to withhold from the reach of the creditors of the bankrupt the value which the firm are shown by the evidence to have put upon his services. That value was one-tenth of the profits in the first instance, and then the additional two-tenths. It is clearly shown that they valued the bankrupt's services at the entire three-tenths. Knox paid $4,000 for his two-tenths to Aaron H. Rathbone. In return he was obliged to devote his services to the business of the firm. Mrs. Rathbone reimbursed to Knox his $4,000, and, in return for her two-tenths of the profits, rendered no services to the firm. The bankrupt's services could only be retained by the firm, by their consenting to allow Mrs. Rathbone to receive her two-tenths without her rendering any services. It, therefore, follows logically and inevitably, that those two-tenths represented, in the estimation of the associates of the bankrupt in the firm, the value of his services to the firm, in addition to the one-tenth paid to him directly, and that the two-tenths were paid to her to retain the bankrupt's services and as a compensation for those services, made on the demand of the bankrupt. There was no other possible consideration moving to the firm for the two-tenths. They did not receive any part of the $4,000 which Mrs. Rathbone paid to Knox, nor did they receive any services in place of those of Knox, and they gave up to

Knox eleven of their customers. It may be that the $4,000 paid by Mrs. Rathbone to Knox, considered as paid by her at the request of and for the benefit of the firm, in order to enable them to retain the bankrupt's services, may properly be reimbursable to her, with interest, out of the two-tenths of the profits paid to her; but, even if that be so, it cannot affect the true character of the transaction, as making her a trustee of such profits for the creditors of the bankrupt.

The eighth specification is, in my judgment, fully proved, in its entire scope. There was a wilful concealment by the bankrupt of his property derived from the two-tenths profits in the firm, by covering it up in the hands of his wife. The care with which the papers were prepared, including the putting in writing at the time the agreement with the bankrupt respecting his one-tenth, which had, in fact, existed for seven months previously, only serves to show the deliberation with which the scheme was contrived. Fraud is scarcely ever made out by direct evidence. The proof of it is generally arrived at by the interweaving of circumstances, till the fabric is fully formed. It is not often that as full evidence of it is shown as in this case, and yet less full evidence is often entirely satisfactory. The documents and the additional testimony produced on the second reference in this case fully sustain the conclusion of the Court on the first hearing and clear up many points that were obscure, and nothing has been shown to induce any modification of any of the views stated in the decision then made by the Court.

A discharge is, therefore, refused.

J. K. Porter and *J. H. White*, for the bankrupt.

H. P. Herdman, for the creditor.

DECEMBER, 1868.

THE STEAM-TUG C. Y. DAVENPORT.

Towboat.—Collision.

Where a steam-tug took in tow a schooner, to tow her out from a pier, next to which was a high balance dock, which shut off the view to the west, and, when the schooner got just clear of the pier, another tug was seen coming from the west with a barge in tow, which came in collision with the schooner:

Held, That the tug having the schooner in tow was negligent, and liable for the collision;

That, even if the other tug and the barge were in fault, that would not diminish the liability of this tug, especially as those vessels were not joined in this action.

Blatchford, J. This is a libel by Jeremiah N. Ayres and Theodore Davenport, to recover damages for a collision which occurred on the 9th of August, 1866, between the schooner G. W. Purnell, owned by them, and a barge called the Annie. The schooner was at the time in tow of the C. Y. Davenport. The barge was in tow of the tug Henry Smith. The schooner had been lying on the upper or easterly side of pier No. 42, East river, New York, bow outward, with the end of her bowsprit seven or eight feet inside of the end of the pier. About six o'clock in the morning, the C. Y. Davenport came to the outer end of pier No. 42, in order to take the schooner in tow, to tow her to 12th street, East river. The tide was strong flood. In the slip next west of pier No. 42, and between pier No. 41 and pier No. 42, there was a large high floating balance dock, which projected out about ten feet beyond the end of pier No. 42, and obscured the view down the river from the end of pier No. 42. The C. Y. Davenport was a small propeller, fifty-

five or sixty feet long. The schooner was ninety odd feet long from the end of her boom to the end of her bowsprit. The C. Y. Davenport lay at the end of pier No. 42, heading to the westward or down the river, when she hitched on to the schooner by a hawser ten or fifteen fathoms long, running from the windlass bitts of the schooner to the after cleets on the C. Y. Davenport. The order was then given from on board the C. Y. Davenport to the schooner, to put the schooner's helm hard a-port, which order was obeyed. The wind was south-east. The C. Y. Davenport cast off and started ahead and pulled the schooner out just clear from the pier, when the Annie and the Henry Smith were seen coming up close to the ends of the piers, very swiftly, with the tide. When this was seen the C. Y. Davenport backed so as to slack the hawser between her and the schooner, but the schooner was struck by the barge, and her bowsprit and both of her masts were knocked out of her by the collision.

On these facts alone the C. Y. Davenport would be liable for the collision. But, in addition, it is shown by Ryan, a witness for the claimant, and who was on the barge at the time, that he, from the barge, saw the C. Y. Davenport before she left the end of pier No. 42, and while she was lying there, and saw her start and pull the schooner after her. It is very clear that no care was exercised on the C. Y. Davenport, or the barge and her tug would have been seen from on board of the C. Y. Davenport before the latter started.

The only defence set up is, that the barge and her tug were in fault in being so near the piers, and that, if the latter tug had ported her helm, on seeing the C. Y. Davenport and the schooner, there would have been no collision. It may be that there was fault in those vessels, but that does not diminish the liability of the C. Y. Davenport, and those vessels are not sued in this action.

There must be a decree for the libellants, with costs,

with a reference to a Commissioner to ascertain and report the damages sustained by them by the collision.

Stewart, Rich & Woodford, for the libellants.

Beebe, Donohue & Cooke, for the claimant.

DECEMBER, 1868.

IN THE MATTER OF EUGENE PULVER. A BANKRUPT.

Bankrupt's Final Oath.—Certificate of Conformity.

Where, on the return of an order to show cause why a bankrupt should not be discharged, creditors, who had proved their debts, appeared and claimed time to file specifications of objection, and objected to the bankrupt's taking the final oath, and to the Register's giving a certificate of conformity:

Held, That the oath required by section 29 of the Bankruptcy Act must be taken and produced to the Register, and he must then certify conformity or non-conformity;

That, if specifications in opposition were filed, the certificate of conformity should be that the bankrupt had conformed, except in the particulars covered by the specifications.

In this case the Register certified to the Court, that, on the return before him of the order to show cause why a discharge should not be granted to the bankrupt, creditors, who had proved their debts, appeared and claimed ten days to file specifications of objection; that the bankrupt asked that the final oath be administered to him, and the Register give a certificate of regularity and conformity; but that the creditors objected that that could not be done until the Court had passed upon the questions to be raised by the specifications. The Register thought the objection not well taken, and certified the question to the Court.

In the Matter of A. B., a Bankrupt.

BLATCHFORD, J. The oath required by section 29 to be taken and subscribed by the bankrupt is to be produced to the Register, and he is then to certify conformity or non-conformity. If specifications in opposition are filed, and the bankrupt has conformed, in the judgment of the Register, to all the requirements of law, and to all his duty under the Act, the Register is to certify that he has so conformed, except in the particulars covered by the specifications.

DECEMBER, 1868.

IN THE MATTER OF A. B., A BANKRUPT.

CHOICE OF ASSIGNEE.

Where, at the first meeting of a bankrupt's creditors, but one creditor appeared, and he proved his debt, and elected as assignee a person who was present, and it appeared that this person was a stranger to the creditor, and had informed him of the meeting, and solicited the creditor's vote for himself as assignee:

Held, That the election of an assignee made under such circumstances could not be sanctioned.

BLATCHFORD, J. In this case the Register, in transmitting to the court the result of the first meeting of creditors, certifies to the court, that, at such meeting, one creditor who had proved his debt appeared; that only one debt was proved; that the Register inquired of such creditor if he desired to elect an assignee; that such creditor replied that he would elect Mr. C. D., who was present; that, as Mr. C. D. had been elected in six out of the last ten cases before the Register, the Register thought it right to make inquiries of the creditor concerning the choice, and elicited from him the statement, that Mr. C. D. was a stranger to him, and called at

his place of business on the day preceding, with one of the notices to creditors, which was the first he had heard of the meeting, and called his attention to the notice, and solicited of him that he would prove his debt and elect Mr. C. D. as the assignee of the bankrupt, and, after consultation, it was agreed that he should attend the meeting of creditors and swear to his claim and vote for Mr. C. D. as assignee; and that this statement was made in the presence of Mr. C. D., who remarked that, if he had not so called upon the creditor, the creditor would never have known of the meeting. The Register remarks, that he saw nothing in the conduct of Mr. C. D. in any way disingenuous, but that, on the other hand, Mr. C. D. was understood by the Register to claim that it was not improper thus to procure himself to be elected. The Register states that he certifies the case to the court, that it may be fully advised of the facts of the case, in passing upon the question of the approval or disapproval of the assignee so elected, only suggesting the inquiry, whether it would be a wholesome proceeding, if adopted and approved by this court.

In addition to the facts stated in the certificate above mentioned, I have been addressed on the subject by Mr. C. D. himself, who states that he proposes to make a regular business of seeking out creditors of bankrupts and soliciting them to prove their debts and vote for him as assignee, with a view to such pecuniary emoluments as may legitimately belong to the position. He is very frank on the subject, and states that he had no idea there was anything improper in what he had done or proposed doing, and that, if the court thought there was, he would at once desist. I have before me now, unapproved as yet, the election of the same Mr. C. D. as assignee, in another case, at an earlier date, before the same Register. I have also before me, unapproved as yet, his election as assignee in three other cases before three other and different Registers. So far

as appears from these cases, his election was made in each of them by a single creditor.

To knowingly sanction the election of an assignee made under circumstances such as those above stated, would be to open the door to abuses whose character can be well conjectured. A free election, proceeding from the real choice of the creditors, is one thing. An election persuaded by the importunity of the proposed assignee, exercised upon indifferent creditors, is another thing. The elections are disapproved in all of the cases above-mentioned.

DECEMBER, 1868.

THE UNITED STATES *vs.* GARNISS E. BAKER.

SETTING ASIDE VERDICT.—DEAF JUROR.—CHALLENGE.

Nothing that is a cause of challenge to a juror before verdict, can be used to set aside a verdict.

Where one of the jurors in a criminal trial was deaf, and the defendant was ignorant of the fact when the jury were empanelled:

Held, That this was no cause for setting aside the verdict.

THE defendant in this case was convicted of an offence under the National Banking Act. After the verdict, a motion was made to set it aside on the ground, among others, that one of the jurors was deaf and did not and could not hear the evidence, and that the defendant was ignorant, at the time the jury were sworn and em-
, of the deafness of the juror.

CHFORD, J. On principle, as well as on authorhing that is a cause of challenge to a juror erdict, can be used to set aside a verdict,

as for a mistrial, even though the cause of challenge was unknown to the party when the jury were sworn. (*Hollingsworth* v. *Duane*, 4 *Dallas*, 353.) The non-possession of any natural faculty stands, in respect to a juror duly summoned, in the same category with alienage or infancy or sex. That a juror is an alien is an objection that must be taken advantage of before verdict and by challenge. (*Hollingsworth* v. *Duane*, *before cited.*) So, it is a ground for challenge, that a juror is an infant or a female. (*Wharton's Amer. Crim. Law*, 2d *ed.*, *p.* 856.) Where an infant is duly summoned as a juror and returned on the panel, his infancy must be objected to by challenge. In the present case the juror was duly summoned and returned on the panel. His alleged incompetency was, therefore, a cause of challenge. (*The King* v. *Tremaine*, 7 *Dow. & Ry.* 684.) The motion for a new trial on this ground is denied.*

B. K. Phelps, (*Assistant District Attorney*,) for the United States.

John Sedgwick, for the defendant.

* A new trial was granted on a question of the weight of evidence, on two counts of the indictment.

DECEMBER, 1868.

A QUANTITY OF DISTILLED SPIRITS, &c., BEING ALL THE PROPERTY FOUND AT THE RECTIFYING ESTABLISHMENT OF WATSON & CRARY, NOS. 171, 173 AND 175 CHRISTOPHER STREET, NEW YORK.

INTERNAL REVENUE.—48TH SECTION OF THE ACT OF JUNE 30th, 1864. 26TH SECTION OF THE ACT OF JULY 13th, 1866.—PRESUMPTION.—EVIDENCE.— REGULATIONS.—BRANDING SPIRITS.

Under the 26th section of the Internal Revenue Act of July 13th, 1866, rectifiers were bound to keep the book prescribed by that section and make the proper entries in it, whether the Commissioner of Internal Revenue had prescribed any rules and regulations on the subject or not.

Where a rectifier had kept a book as so prescribed and had himself made an entry in it of a certain purchase, which entry did not comply with the requirements of the Act, but he gave no evidence to explain the discrepancy:

Held, That the jury must take anything doubtful about the entry most strongly against him.

Where a party to a suit has in his possession evidence which he can give to clear up any doubt, and he does not give it, there is a presumption that the evidence, if given, would corroborate that which has been given against him.

The fact that spirits are purchased for less than the amount of the tax upon them is sufficient evidence, in the absence of any explanatory circumstances, to show that the purchaser could not have believed that the tax was paid.

Where spirits were proved to have been found upon a rectifier's premises and no proof was given that the tax had been paid:

Held, That the jury were to assume, as matter of law and as matter of fact, that the tax had not been paid.

The 48th section of the Act of June 30th, 1864, is not ambiguous, nor is the statute a penal one.

The fact that spirits were properly branded by United States' Inspectors is not evidence that the taxes on them had been paid.

CHARGE OF JUDGE BLATCHFORD TO THE JURY.

GENTLEMEN OF THE JURY: It is a subject of congratulation that this case, to which we are now devot-

ing our attention for the seventh day, is drawing so near its completion. Notwithstanding the time it has occupied, and the zeal with which it has been prosecuted and defended by the counsel upon both sides, the issues which you are to pass upon will be found by you to be embraced within a very narrow compass, although the evidence applicable to those issues has taken a wide range. The case has resolved itself into a prosecution, by the Government, upon two sections of the Internal Revenue Law—the 26th section of the Act of July 13th, 1866, and the 48th section of the Act of June 30th, 1864, as subsequently amended.

I shall first direct your attention to the 26th section of the Act of 1866. The questions for your consideration under that section divide themselves into three subjects of investigation. The first one is the spirits taken to this establishment in Christopher street by Nelson in the Spring of 1867. The second is the lot of spirits, called seventy-five barrels in the evidence, taken there, as appears by the evidence for the claimants, on the 1st, 4th and 5th of February, 1868. The third is the thirty barrels of spirits called the Duffy spirits, taken there on the 11th of February, 1868. The provisions of the 26th section of the Act of 1866 are to this effect: "That every rectifier or wholesale dealer in distilled spirits shall enter daily in a book or books kept for the purpose, under such rules and regulations as the Commissioner of Internal Revenue may prescribe, the number of proof gallons of spirits purchased or received, of whom purchased and received, and the number of proof gallons sold or delivered; and every rectifier or wholesale dealer, who shall neglect or refuse to keep such record, shall forfeit all spirits in his possession, together with the apparatus, tools, and implements used." Now, gentlemen, the requirements of this section of the statute are perfectly plain and unmistakable. There is no ambiguity and no confusion

about them. There is no room for any difficulty or embarrassment on the part of any one desiring to comply with the law. The language used in the section must be understood in its ordinary, plain, common-sense meaning. Where a rectifier or wholesale dealer is told that he is to enter daily in a book his receipts of spirits, of whom he receives them, and the number of proof gallons he receives, he can understand but one thing from that direction—that he is to do the thing every day, day by day, as he receives the spirits, upon the day on which he receives them. The section manifestly intends that he shall put down the day in the book. And the fact that, in practical construction, in acting upon this statute, these claimants did keep a book in which they did put down, day by day, apparently, the number of barrels, the number of proof gallons, the persons from whom purchased or received, and the date, shows that they understood what every man must understand by the law—that the party is not only to make the entries daily, but is to put down the day, so that it may be known upon what day he receives a given number of barrels, containing a given number of proof gallons, and the person from whom he receives them. Therefore, when we find this practical construction thus acted upon by these claimants, this recognition of what the law is, it is idle to speculate about what the law requires. There is no doubt whatever that the plan upon which this book was kept by the claimants is a compliance with the law requiring the party to put down the day, and the number of barrels, and the number of proof gallons, and the person from whom purchased or received. The only question is whether the law, as thus interpreted and recognized by the claimants themselves, has been complied with.

That the claimants were rectifiers of spirits is perfectly apparent. The eighteenth paragraph of the

seventy-ninth section of the Act of June 30th, 1864, as subsequently amended, defines what a rectifier is: "Every person, firm, or corporation who rectifies, purifies, or refines distilled spirits or wines by any process, or who, by mixing distilled spirits or wines with any materials, manufactures any spurious, imitation or compound liquors for sale, under the name of whiskey, brandy, gin, rum, wine, spirits, or wine bitters, or any other name, shall be regarded as a rectifier." That is the definition the law gives of a rectifier. A rectifier is not merely a person who runs spirits through charcoal, but any one who rectifies or purifies spirits in any manner whatever, or who makes any mixture of spirits with anything else, and sells it under any name, is a rectifier. Now, that these parties were rectifiers is quite apparent from the testimony, and is not disputed, as I understand it; and, therefore, it was their duty to make the proper entries in this book, and to make them whether the Commissioner of Internal Revenue had prescribed any rules and regulations on the subject or not. If he had made any, they were bound to comply with the rules and regulations. But if he had made none, they still were bound by law to make the entries. The rules and regulations are to be prescribed by the Commissioner of Internal Revenue, merely to secure the proper form of making the entries; but, if there are no rules and regulations prescribed by that officer, the statute is nevertheless binding on the parties. It is alleged here, as I understand it, that the Commissioner has made no rules and regulations that amount to anything, but has merely recited the statute, the only circumstance in addition being the requirement that the record shall be kept continuously. It appears, then, that these parties, without any rules or regulations being prescribed, have gone on and kept a book, which is substantially kept in compliance with the statute; and, therefore, in reason and sense, as well as in prac-

tice, it is shown that the requirement about rules and regulations is pure surplusage, and amounts to nothing in reference to this case. The parties being required thus to enter daily, that is on the day on which they received the spirits, the number of proof gallons received, and of whom received, the only question is, whether the statute has been complied with, or whether they have failed to comply with it in any one of the three cases that have been brought to your attention on the part of the Government. If the claimants have failed to comply with the statute, then all the spirits found in their establishment, and all the apparatus, tools, and implements found there, that were used in their business, are subject to forfeiture.

In reference to the spirits taken to the establishment by Nelson in the Spring of 1867, it is in evidence on both sides that spirits were taken there at that time. I shall not recapitulate the evidence, for it is fresh in your memory. The substance of the evidence of Nelson and Andrews, and of the other testimony on the part of the Government in that connection is, that Nelson took there, during February, March, and April, 1867, spirits to the extent of four thousand gallons. It is contended on the part of the claimants that Nelson took there only twenty-five barrels, or rather that he took thirty two barrels, and that seven of them were subsequently taken away, leaving but twenty-five barrels substantially received, containing only thirteen hundred and thirty-five gallons. That is the issue of fact between the parties on that subject; and it is for you to say, from the evidence, whether you believe that four thousand gallons were taken there in all, and that some was taken there in February and some in April, as well as some in March, or whether you believe that only thirteen hundred and thirty-five gallons were left there, being twenty-five barrels out of thirty-two that were taken there, and that those were taken there

in March, as testified to by Mr. Blanchard. Which one of those two stories you will believe, will depend upon your consideration of the evidence in the case, and upon the credit you give to the witnesses upon the two respective sides on the subject.

The only entry found in this rectifiers' book during February, March, or April, 1867, of any spirits received from William Stewart, (the spirits carried by Nelson having come from Stewart,) is an entry which is found upon the third line of the third page of the book. The two preceding entries upon the same page are under the date of "March 29," one of thirty-four barrels from John Schrievers, and another of ten barrels from Ezra Hill. Then follows the entry in question. In the column for the month is no mark at all. In the column for the day of the month is the figure "3," the preceding line having in the same column a couple of dots, and the top line having in the same column the figures "29," and in the column for the month the word "March." The entry on the next line below the third line is under the date of "April 1." Now this entry, which commences thus with the figure "3," contains, under the head of "Barrels or Packages," the figures "25;" under the head of "Purchased or Received, proof gallons," the figures "$1335\frac{23}{100}$;" and under the head of "From whom purchased or received," the words, "William Stewart." That is all there is in this book about any spirits received from William Stewart—25 barrels, 1,335 gallons—the entry as to the date being such as I have stated to you, that is, following March 29th and immediately preceding April 1st, is the figure "3," in the column for the day of the month. You have heard the testimony of Blanchard on that subject, as to when these spirits were received and how many barrels there were, and when they were dumped. He says he went home to see his family on the 30th of March, and that these spirits were dumped on that day.

This entry that I have read to you in regard to the twenty-five barrels is proved to be in the handwriting of George D. Crary, one of the claimants. The two entries which immediately precede, as well as the four which immediately follow this one, are also shown to be in the handwriting of Mr. Crary. It is quite apparent, therefore, that if any more light is needed to be thrown upon any doubtful question in regard to those twenty-five barrels, Mr. Crary possesses the information, because he made the entry; and, if there be any point about the testimony that is at all doubtful, you are to take it most strongly against the claimants, because Mr. Crary, having the means of clearing up all difficulty, the entry being in his handwriting, has given no testimony on the subject. That rule of law is applicable to every branch of this case. Wherever it is shown that a party to a suit has in his possession evidence which he can give to clear up any doubt, or to resolve any difficulty, and he does not give it, the jury have the right to draw the presumption that the evidence, if given, would be in corroboration of that which has already been given against him. That rule is applied every day in seizure cases under the revenue laws, and has been enforced by the Supreme Court of the United States, and particularly in the case cited to you by the counsel for the Government in summing up—the case of *Clifton* v. *The United States*, (4 *Howard*, 242,)—in which the opinion of the court was delivered by Mr. Justice Nelson, who presides in the Circuit Courts of this Circuit. If, therefore, there be any doubt or difficulty in regard to this entry of these twenty-five barrels, that requires clearing up, the entry being in the handwriting of Mr. Crary, the fact, that he is not called as a witness on the subject, is to be taken as a very strong circumstance in corroboration of everything that has been shown on the other side.

Now, gentlemen, if you shall find that spirits were

taken to that establishment in 1867, other than the spirits embraced in this entry of the twenty-five barrels, and that more spirits were received at that establishment than were entered in this book, then, under the 26th section of the Act of 1866, everything found in the establishment is forfeited to the Government; because, as I understand it, it is not claimed that there was any property found there, that is proceeded against in this suit, other than that described in the 26th section —that is, the apparatus, tools, and implements used in the business of rectifying. This suit does not concern the direct forfeiture of any spirits. I shall say nothing more on the subject of the Nelson or Stewart spirits.

We now pass to the spirits received there on the 1st, 4th and 5th of February, 1868, consisting of seventy-five barrels said to have come from Loeb Brothers, five barrels directly, and seventy through a broker by the name of Schloss. The evidence of Mr. Libby, the claimants' foreman, is substantially to this effect—that he received five barrels on the 1st of February, and took the proofs and gauges of their contents at the time, and set down on a piece of paper what he so took, and gave that paper into the hands of Mr. Crary himself on the morning of the 2d of February, the next day, but did not enter in the book that day the number of proof gallons. He also states, that, on the 4th of February, he received five barrels more, but did nothing with them except to lay them aside until the next morning; that on the 5th he received sixty-five barrels more; and that then, on the 5th, he went through those sixty-five barrels and the five received on the 4th, and gauged and took the proofs of the entire seventy, and put down the figures derived from this gauging and taking of proofs, upon a piece of paper. He states that the entry found in this book, purporting to be an entry on the 5th of February of seventy barrels, containing four thousand and thirty-four proof gallons, received from Frederick Schloss, be-

ing the sixty-five barrels received on the 5th and the five barrels received on the 4th, was, so far as the proof gallons were concerned, not made until the 7th of February; that, on the 5th of February, he entered the number of barrels, that is the figures "70," and also the words "Frederick Schloss;" that he entered nothing else on the 5th; and that he did not enter the proof gallons until the 7th. Now, if that testimony is true, as given by Mr. Libby, it is quite apparent that he did not enter on the 5th, that is, on the day when the sixty-five barrels were received, the number of proof gallons contained in the sixty-five barrels, and that, therefore, the 26th section was violated. If it was violated, a forfeiture was incurred, and the Government is entitled to your verdict on that section.

So, also, in regard to the other entry in question, that of the thirty barrels which Mr. Libby testifies were received on the 11th of February. He says that he entered on that day in the book what we find here—the figures "11" and the number of barrels, "30." There is no entry at all of the number of proof gallons. There are the words, "J. Duffy, Rectifier," in the column "From whom received;" but in the proof gallons column there is no entry whatever. Those spirits were received on the 11th, and the place was not taken into the custody of the Government until the 14th.

Upon these naked questions of fact, this property would be condemnable for a violation of the 26th section. But, gentlemen, in addition to that, the evidence shows most conclusively that there was no difficulty, or hardship, or impracticability, or impossibility in making the entries of the number of proof gallons upon the same day on which the spirits were received; because, if you are to believe the testimony of the witnesses for the claimants, there were in the establishment the means of arriving at the number of proof gallons. There was an instrument by means of which they could

and did ascertain how much a barrel would hold if it was full; also an instrument by which they could ascertain what vacant space there was in a barrel that had some liquid in it; and an instrument whereby they could tell the strength of the proof of the liquor. With those three things set down upon a piece of paper, it was, as Mr. Libby testifies to you, the work of from two to five minutes to calculate, and that he could do it, the number of proof gallons in any given barrel of spirits to which he had so applied the guage-rod and the hydrometer. For the claimants to establish a course of business in violation of the law, and then to claim exemption because they established such a course of business, furnishes no excuse whatever. With the means of ascertaining the contents of a barrel, if Mr. Libby, charged with the duty, and a competent man, as it appears, had put down in the book the number of proof gallons, as ascertained by him from his best, and an honest, calculation made at the time, and it afterwards turned out, in point of fact, that he had made a mistake, there could be no confiscation and no forfeiture. An honest mistake of that kind is one thing, but an utter and total neglect to comply with the law is a very different thing.

These are all the questions to be submitted to you on the 26th section of the Act of 1866. The only other question is one arising on the 48th section of the Act of June 30th, 1864. That there were spirits in this place at the time it was seized, and spirits of a kind liable to duty under the Internal Revenue laws, and upon which the duty, if it had not been paid, ought to have been paid, is unquestionable. If these spirits, at the time of this seizure, on the 14th of February, 1868, were found on the place, in the possession or custody, or within the control, of any person or persons, for the purpose of being sold or removed by such person or persons in fraud of the Internal Revenue laws, or with

design to avoid the payment of the tax, then, not only are the spirits forfeitable under this section, but also all tools, implements, instruments, and personal property whatsoever, in the place or building where the spirits were found. The main question under that section is contained in the words, "for the purpose of being sold or removed by such person or persons in fraud of the Internal Revenue laws, or with design to avoid the payment of said taxes." That is the material question in the case. It seems to be undisputed that, so far as regards the possession, custody or control of such spirits as were found there at the time, they were in the possession, custody and control of the claimants. No other person is shown, from the evidence, to have had any proper custody or control of them. The custody and control that Libby had was as a subordinate of Watson & Crary's, and, therefore, Watson & Crary, for the purposes of this case, they being the claimants in this suit, and having interposed a claim and answer, are to be regarded as the persons found in the possession, custody, and control of the spirits; and the only question is, whether they had the purpose of selling or removing those spirits in fraud of the Internal Revenue laws, or the design of selling or removing them to avoid the payment of the tax upon them.

It is necessary that I should here call your attention to a provision of the Internal Revenue law to which no allusion has been made by the counsel upon either side, and which, in my judgment, has a very strong bearing upon the questions which arise in this case under the 48th section. It is the 14th section of the Act of March 2d, 1867, which provides, "that there shall be levied, collected and paid on all distilled spirits upon which no tax has been paid according to law, a tax of two dollars upon each and every proof gallon, to be paid by the distiller, owner, or any person having possession there-

of." The same section goes on to provide, that the tax shall be a lien upon the spirits distilled until the said tax shall be paid. The lien for the tax follows the spirits everywhere, and any person into whose possession they come, without the tax on them having been paid, is bound to pay it. Now, so far as I recollect the evidence, there is no testimony on the part of the government, in this case, as to the quantity of spirits in gallons, or in any other appreciable measure, that was found in this place at the time of the seizure. Nor is there any evidence on the part of the government, as to the identity of the spirits that were found there, or where they came from, or any evidence on the part of the claimants, as to when the spirits that were found in the vats were put there, or as to where they came from, or as to how long they had been there. And, as I recollect the evidence, there is no evidence in the case on either side, whereby the jury can arrive at any definite or clear conclusion as to whether any of the spirits that Nelson took there in the spring of 1867, were or were not in that establishment when it was seized, or as to whether any of the spirits contained in the seventy-five barrels of spirits said to have come from Loeb Brothers, were or were not there at the time of the seizure, or as to whether any of the spirits contained in the thirty barrels of spirits that came from Duffy, were or were not there at the time of the seizure. The evidence on both sides on that subject, as I recollect it, leaves the whole matter in entire uncertainty, in regard to the identity of the spirits that were found there at the time of the seizure, as to whether they may have been some of the Duffy spirits, or as to whether they may have been some of the Loeb spirits, or as to whether they may have been some of the spirits which Nelson took there in the spring of 1867. If the quantity of spirits that was found there had been proved, that might be some sort of guide in the matter, because

thirty barrels would make, I suppose, not over fifteen hundred proof gallons, on the average.

This point, to which I have just called your attention, comes up under the 48th section. If it was important to show whether the spirits found in the vats were or were not part of a particular lot of spirits, if it was important to show whether they were or were not part of the Duffy spirits, or were or were not part of the Loeb spirits, it was for the claimants to show it. They possess the knowledge or the means of knowledge, as to what the spirits were that were found in the vats. They turned them in there themselves, and it was for them to clear up any doubt or difficulty on that subject that might arise upon the evidence. It was for them to show there were no spirits found in that establishment, at the time of the seizure, that were brought there by Nelson in the spring of 1867. As far as I recollect, we have no account of what became of any of the Nelson spirits, except that Blanchard says that twenty-five barrels were dumped on the 30th of March, and seven were sent away. There is no testimony that the contents of the barrels, other than the seven, ever went out of the establishment, or that they were not in the vats still. It was for the claimants to show that fact, if it be of any consequence or importance. The point of view in which it is important arises under the provision of the 48th section which says, that all spirits which shall be found in the possession of any person for the purpose of being sold, &c. That spirits were there, there is no doubt. The quantity is not stated, and what spirits they were does not appear. If they were some of the Nelson spirits, the circumstances attending the receipt of the Nelson spirits may, as you can well see, be of very great importance upon the question as to whether there was any purpose to sell or remove those spirits with design to avoid paying the tax on them. So, also, with regard to the seventy-five barrels of the

Loeb spirits, and the thirty barrels of the Duffy spirits, if any of those spirits still remained in the establishment, the circumstances attending the acquisition or receipt of those spirits at the establishment, are circumstances to be taken into consideration by the jury upon the question as to what the design of the parties was in regard to the spirits, and in regard to selling and removing them. Therefore, the first questions the jury would naturally ask would be these: Were there spirits found in this establishment? What spirits were they? Where did they come from? Were they part of the Nelson spirits? Were they part of the Loeb spirits? Were they part of the Duffy spirits? We do not know. It was for the claimants to clear up any confusion on that subject. The government seize the place. They find spirits in the vats. They cannot tell where the spirits came from. But the claimants know, and it is for them to show; and, if there be any doubt, embarrassment or difficulty, the point must be resolved against the claimants, for they have not shown anything on the subject. They have not shown that the Nelson spirits ever went out of the place, or that they were not still in the vats. So with regard to the Loeb spirits, it does not appear what became of them after they were dumped, as Blanchard testifies, or whether they remained in the vats at the time of the seizure, or what quantity of spirits was in the vats. And the same in regard to the Duffy spirits.

If there were any spirits there, which these parties purposed to sell or remove in fraud of the law, or with design to avoid the payment of the tax, the spirits, and everything in the establishment, are forfeited. Now, there being a tax upon the spirits of two dollars a proof gallon, you are to assume, as matter of law, for the purposes of this case, that that tax had not been paid upon any of the spirits that were found in this establishment at the time of the seizure. It was for the claim-

ants to show whether or not the tax had been paid, and, as there is no evidence that it had been paid, you are to assume, as matter of law, and as matter of fact, that it had not been paid. Therefore, the only question for your consideration will be, whether these spirits, upon which the tax had not been paid, were in the possession of the claimants with the purpose on their part of selling or removing such spirits in fraud of the Internal Revenue law, or with design to avoid the payment of the tax.

When a tax of two dollars a gallon is put upon an article of this kind, and it is found in the possession of a party, the tax not being shown to have been paid, if the party purchased the article, the price he paid for it is a pretty good criterion of whether he had reason to believe the tax had been paid upon it or not. In this case you have, upon the subject of price, one piece of direct testimony, if you believe it—and whether you will believe it or not, is a question for your consideration solely—and that is the testimony of Andrews in reference to one bill, which he at first stated was $700 or $800, and afterwards corrected, by stating it was $500, for which he saw or received a check. He says, in regard to the spirits in that bill, which were some of the spirits that Nelson carried to the establishment, that Mr. Crary stated to him that the price was one dollar and twenty-five cents, or one dollar and thirty cents, a gallon. In regard to the seventy-five barrels of spirits from Loeb Brothers, and the thirty barrels from Duffy, there is no testimony, as I recollect it, in regard to the price paid, although it appears, as a matter of fact, by the testimony on the part of the claimants, that the seventy-five barrels from Loeb Brothers, and the thirty barrels from Duffy, were purchased spirits, or spirits bought by Watson & Crary, and not spirits received to be rectified for hire or wages. So, also, the testimony in regard to the Nelson spirits, if there be any testimony on the

subject, is that it was purchased spirits. I refer to the testimony of the witness Andrews, in regard to the price of the Nelson spirits, because, in the view which I have presented to you, it being left wholly uncertain by the claimants whether some of the Nelson spirits were not still in the establishment, the Nelson spirits must be taken into consideration, under the 48th section, as well as the spirits that were in the seventy-five barrels and in the thirty barrels. As I have said to you, an important piece of evidence upon the question of whether a man believes that the tax has been paid upon spirits which he buys, is the price that he pays for the spirits, because no man can pay one dollar and twenty-five cents, or one dollar and thirty cents, a gallon, for spirits upon which there is a tax of two dollars a gallon, and honestly believe that the tax on those spirits has been paid. That is an utter impossibility, He may receive all the barrels in the world branded "tax paid," and yet, the very fact that he receives the spirits contained in them at the price for which he purchases such spirits in the market, must, in the absence of all circumstances to show why the spirits were sold for a less price than the tax itself, be convincing evidence to any honest mind that the tax has never been paid on the spirits. Now, with the knowledge on the part of the claimants, of what they paid for the Nelson spirits, and of what they paid for the Loeb spirits, and of what they paid for the Duffy spirits, the fact that they have not shown that they paid the price of two dollars and a half, or three dollars, or four dollars, a gallon, or more than one dollar and twenty-five cents, or one dollar and thirty cents, a gallon, is to be taken most strongly against them; and the fact that they have not shown that they paid more than enough to cover the tax on the spirits, is to be accepted by you, in the absence of any testimony to the contrary, as evidence that they paid for the spirits less than two dollars per gallon. It undoubtedly

may happen that spirits may be honestly in the possession of a party, under circumstances where he has paid for them less than two dollars per gallon. Every case must be judged upon its own circumstances; and, in any case where a fair and reasonable explanation is given to show that the party has honestly dealt in the spirits, not having reason to believe that the tax had not been paid, the excuse will be recognized by a Court and a jury. But the excuse must be shown, the reason must be shown, why the price was less than two dollars per gallon; otherwise, the jury are authorized to believe that the party could not have honestly supposed that the tax had been paid upon the spirits. The mere fact that he bought the spirits for less than two dollars a gallon is sufficient evidence, in the absence of any explanatory circumstances, to show that he could not have believed that the tax was paid. That is the same principle of law which I referred to before, in the matter of the entry in regard to the twenty-five barrels in Mr. Crary's handwriting—that, where a party is in possession himself of the means of clearing up a doubtful point, and does not do it, but, instead of that, resorts to all sorts of evidence on the subject, except the direct evidence which he himself could give, every doubt is to be resolved most strongly against him. This rule applies, also, to every material point in the case—to any conversation or any transaction which you may believe, from the testimony, to have taken place between any witness and Mr. Crary, or either of the claimants. If such conversation or transaction is not denied by the testimony of the party with whom it took place, the fact that he does not deny it is to be taken most strongly against him, because, in this case, the claimants are competent witnesses for themselves, leaving only the question of credibility for the jury.

I believe, gentlemen, that I have called your attention, substantially, to all the views which it is important

I should bring to your notice. If you shall find that any spirits were in the possession of Watson & Crary at their establishment in Christopher street, at the time of this seizure, for the purpose of being sold or removed by them in fraud of the law, or with design to avoid the payment of the tax on such spirits, you will find for the government.

I am asked by the counsel for the claimants to charge you upon a very long series of propositions, which it is my duty to go through with as rapidly as I may, consistent with a careful consideration of them, and to pass upon one way or the other. The propositions are these:

"1. Under section 48 of the Act of 1864, the jury cannot find a verdict of condemnation and forfeiture, unless they find that the article seized was, at the date of seizure, in the possession or custody, or within the control, of the claimants for the purpose of being sold or removed by them in fraud of the Internal Revenue laws, or with a design to avoid payment of the proper taxes thereon." I have already charged you that that is true.

"2. The burden of proof is upon the government to establish that the property seized was in the possession of the claimants with the intent, on their part, of selling or removing it in fraud of the Internal Revenue laws, or with design to avoid the payment of the proper taxes." That is true, subject to the observations on the subject which I have made.

"3. The jury cannot find a verdict of condemnation or forfeiture under section 26 of the Act of 1866, unless they find that the property in question belonged to a rectifier or wholesale dealer in distilled spirits." That is true. I have already charged it.

"4. If the claimants were either rectifiers or wholesale dealers in distilled spirits, there was no obligation upon them, under the law, to make any entries such as

are required by this section, unless the jury find that the Commissioner of Internal Revenue had made regulations regarding such entries." That is not true. I decline to charge it.

"5. Under this section, there was no obligation on the part of the claimants, as rectifiers or wholesale dealers, to make any entries of specific dates." That is not true. There was an obligation on them to make entries of specific dates.

"6. This section must be construed as an entirety, so as to give operation to all the provisions thereof." That is not true, and I decline to charge it.

"7. The statute only requires the number of proof gallons to be entered when the spirits are purchased by the person receiving the same." That is not true, and I decline to charge it.

"8. There is no obligation to make any entry, unless the spirits are purchased and received." That is not true, and I decline to charge it.

"9. There is no obligation upon the purchaser to make the entries in the book until he has had an opportunity to examine the quality and quantity of the purchase." That is not true. He is bound to make them daily.

"10. The law allows the purchaser a reasonable time to verify the quantity and quality of his purchase, and, unless the jury find that an unreasonable time had elapsed between the delivery of any of the spirits which the claimants may have purchased, and the entry there-

book, the jury cannot find a verdict against
nts." I decline to charge that.

fore the jury can find a verdict for the gov-
this action, they must find that the claim-
cted and refused to keep such book, with
vade the provisions of the section in ques-
at is not true. The question of intent has
do with the case. The forfeiture is imposed
lect, no matter what the intent is.

"12. The law is ambiguous." That is not true. The law is clear and unmistakable in all its provisions.

"13. In one reading it requires spirits received to be entered, no matter for what purpose they were received; and in another reading it requires the entry to be made when the spirits are purchased." That I decline to charge.

"14. This being a penal statute, the claimants are entitled to the benefit of this ambiguity." I decline so to charge.

"15. Unless the jury find that they neglected and refused, after they became the purchasers of any spirits, to make the proper entries within a reasonable time after such purchase had become legally complete, the jury cannot find a verdict for the government; and, unless the jury find that at the time the spirits were delivered to the claimants there was delivered to them an invoice or return showing the number of proof gallons contained in the casks or barrels delivered, the claimants were entitled to a reasonable time to ascertain such proof gallons." There is no doubt about that. But it is not a practical question in this case, because the testimony on the part of claimants shows that they had a reasonable time, and took it, and that there was no difficulty about making the entries.

"16. If the jury find that they did not employ more than a reasonable time to ascertain the number of proof gallons, the claimants are entitled to a verdict." I decline to charge that, because there is no question on that subject in the case.

"17. The jury cannot find a verdict of condemnation and forfeiture against any apparatus, tools, or implements used by the claimants, unless they find that the claimants were rectifiers or wholesale dealers, and that, as such, they neglected or refused to make proper entries in the proper book, with intent to evade the provisions of this section." There is no question of

intent in the section. I, therefore, decline to charge that.

"18. Under the 26th section of the Act of 1866, if a rectifier of distilled spirits shall enter or cause to be entered in a book kept for that purpose, the number of proof gallons of spirits purchased or received, of whom purchased and received, and the number of proof gallons sold or delivered, as soon as he, in the exercise of due vigilance, can ascertain those facts, so as to make the entries correctly, that is a substantial compliance with this section." I decline to charge that, except in so far as I have heretofore charged in accordance with it.

"19. If a rectifier of distilled spirits enters in the book, under the appropriate head, the number of proof gallons of spirits purchased or received, as soon as, by the exercise of reasonable diligence, he can ascertain the correct amount, that is a substantial compliance with the section in that regard, although such entry be not made on the day when the distilled spirits are purchased and received." I decline to charge in accordance with that, except as I have heretofore charged in accordance with it, and only to that extent.

"20. If the jury are satisfied, from the evidence, that the witness Nelson has wilfully and corruptly testified falsely in regard to any material fact in the case, the jury should disregard his evidence." That proposition is undoubtedly true. If a man wilfully and corruptly testifies falsely in regard to any material fact, the jury should disregard his evidence. Apply that rule to every witness in the case on both sides.

"21. If the government has failed to prove, by the evidence in the case, that the articles on the premises in question were there for the purpose of being sold or removed by the claimants, or either of them, in fraud of the Internal Revenue laws, or with the design to avoid the payment of the taxes due the government,

the verdict must be for the claimants, so far as the forty-eighth section of the Act of 1864 is concerned." That is true. If the government has not made out a case under the forty-eighth section, it cannot have a verdict, and the verdict must be for the claimants.

"22. In order to establish their case it is incumbent on the government to prove that the taxes on the articles in question had not been paid, and that the claimants knew or had reasonable ground to believe that such taxes were not paid." That proposition I divide into two parts. It is not necessary for the government to prove that the tax had not been paid. You are to assume that it had not. But it is for the government to show that the claimants knew, or had reasonable ground to believe, that the tax was not paid, because, a person cannot have spirits in his possession with design to avoid the payment of the tax on the spirits, unless he knows, or has reasonable cause to believe, that the tax on them has not been paid.

"23. If the claimants, at the time they purchased and received the spirits on the premises in question, had reasonable ground to believe that the taxes on said spirits had been paid, the verdict on the forty-eighth section should be for the claimants." That is not a correct proposition. In the first place, it does not appear, by any evidence on the part of the claimants, when they did purchase and receive the spirits found on the premises in question. Moreover, if a person, at the time he purchases and receives spirits, has reasonable ground to believe that the tax on them has been paid, and afterwards finds out that the tax on them has not been paid, the spirits will still be liable to seizure. The instruction prayed refers the whole thing to the time when the party purchases and receives the spirits, and the proposition is, that if he then has reasonable ground to believe that the tax has been paid, the spirits can never be liable to seizure. The statute is just the other

way. The statute provides, that if the spirits are found in the possession of any person for the purpose of being sold or removed in fraud of the law, they shall be forfeited. A person may, when he receives the spirits, have an idea that taxes on them are paid, and he may keep them some time, and during that period may find out that the taxes have not been paid. In such a case, after he finds out that the taxes have not been paid, the spirits are in his possession with notice that the taxes on them are not paid. The proposition, that the question is whether, when these parties received the spirits, they had reasonable ground to believe that the taxes on them had been paid, is not sound.

"24. In determining whether the claimants had or had not reasonable ground to believe that the taxes on said spirits had been paid, the jury should take into consideration the fact whether the barrels or casks containing said spirits were properly branded at the time they were received by the claimants." That is true. You must take the fact of branding for what it is worth.

"25. If the jury believe from the evidence that the barrels or casks containing said spirits were properly branded at the time they were received by the claimants, the jury have a right to infer that the claimants received said spirits in good faith, and believing that the taxes on them had been paid." I decline to charge that. You are to take into consideration that evidence, with all the other evidence. You are not to draw an inference merely from that fact alone.

"26. If the spirits in question, at the time they were received by the claimants, were properly branded, by the United States inspectors having legal authority to brand them, as tax-paid, the fact that said spirits were so branded, in the absence of any proof of fraud, is evidence that the taxes upon them had been paid." That is not so. It is evidence of nothing except that the barrels were so branded.

"27. If there be any reasonable doubt arising upon the evidence, as to whether the Government have established their case, within the rules of law applicable to the subject, the verdict should be for the claimants." That is undoubtedly true. The Government must make out their case. They must make it out by a preponderance of evidence. It is not like a criminal case, where the defendant is entitled to the benefit of a reasonable doubt of guilt, but the Government must make out their case by a preponderance of evidence.

"28. In any legal aspect of the case, it is incumbent on the Government to prove (1.) That the taxes on the spirits, or some portion of them, found on the premises at the time of the seizure, were not paid." That is not true. I charge you to the contrary. You are to assume that the taxes were not paid, because the claimants have not shown that they were paid.

"(2.) That the claimants, or one of them, knew or had reasonable ground to believe that the taxes had not been paid." That is true. I have already charged you that.

"(3.) That the spirits were on the premises for the purpose of being sold or removed in fraud of the Internal Revenue laws, or for the purpose of avoiding the payment of the taxes." That is true.

"29. If the Government has failed to prove any of the propositions above named, the verdict should be for the claimants, under the forty-eighth section." That is not correct, because it embraces the proposition about the burden of proof as to the payment of the taxes.

"30. Inasmuch as there is no proof on the part of the Government that the taxes were not paid on the spirits found on the premises at the time of seizure, the verdict should be for the claimants, on the forty-eighth section." I decline to charge that.

"31. Even if the spirits which Nelson testifies he delivered at Watson & Crary's establishment were de-

livered by him as he states, and the taxes on them were not paid, that fact would furnish no reason for the condemnation of the property on the premises, as there is no proof that these spirits, or any portion of them, were on the premises at the time of the seizure." I decline to charge that, because there is no proof given on the part of the claimants that those spirits were not on the premises at the time of the seizure, and it was for the claimants to show what the spirits were that were found on the premises. They had the means of knowledge on the subject.

"32. The non-production of testimony by the claimants does not relieve the Government from the necessity of proving their case where they, the Government, have the burden of proof." That is true as an abstract proposition, and, also, as applicable to this case; but I have already charged you as to what the real effect of the non-production of testimony by the claimants is.

Now, gentlemen, I believe you understand this case by this time, and I commit it to your consideration, satisfied from the patience with which you have listened to the trial, that you will bestow equal care and attention upon the verdict which you are to render.

The Jury rendered a verdict for the Government on the 26th section of the Act of 1866, and the 48th section of the Act of 1864.

DECEMBER 1868.

IN THE MATTER OF LEOPOLD LIPPMAN, ON HABEAS CORPUS.

INTERNAL REVENUE ACT OF JUNE 30, 1864, § 14.—PRODUCTION AND EXAMINATION OF BOOKS.—PRIVILEGE OF WITNESS.—ATTACHMENT FOR CONTEMPT.

Where a tobacco manufacturer was summoned by an assessor of Internal Revenue to appear and produce all books of account containing entries relating to his business, and failed to obey the summons, whereupon an attachment was issued by a United States Commissioner against him, and he was arrested and committed by the Commissioner to the custody of the marshal till he should produce the books, whereupon a writ of *habeas corpus* was issued in his favor, on the hearing on which he claimed that a criminal proceeding had been commenced against him for making false returns to the assessor and that he could not produce the books or give the evidence without criminating himself:

Held. That he must bring the books which contained entries relating to his business before the assessor, and must then be asked to exhibit any entry relating to a particular point to be named in the inquiry, and, if he should say that he could not do so without criminating himself, he would be protected from exhibiting it.

Lippman was brought up on a *habeas corpus*, being in the custody of the marshal of the United States for this District, on an order and commitment made by a Commissioner of the Circuit Court of the United States for this District, under the provisions of the 14th section of the Internal Revenue Act of June 30th, 1864, as subsequently amended. For one of the causes specified in that section the assessor of the proper district summoned the relator, who was a tobacco manufacturer, to appear before him and produce all books of account in his possession, custody or care, containing entries relating to his trade or business during a period of time specified in the summons, and to give testimony re-

specting his returns made as such tobacco manufacturer. The summons was duly served on the relator, the books referred to in it being described in it with reasonable certainty. He neglected to obey the summons, and did not appear or produce the books referred to. The assessor then applied to the Commissioner, under the section, for an attachment against him as for a contempt. The Commissioner heard the application, and, satisfactory proof being made to him, issued an attachment to the marshal for the arrest of the relator. The relator was arrested and brought before the Commissioner, who heard the case on evidence, and made an order committing the relator to the custody of the marshal, till he should produce before the assessor the books referred to in the summons and give testimony as required. It was alleged that the relator had made false and fraudulent returns to the assessor, and the relator set up that a criminal proceeding had been commenced against him for making such alleged false and fraudulent returns, and that he could not produce the books or give the testimony without criminating himself.

M. V. B. Wilcoxson, for the relator.

T. Simons, (Assistant District Attorney,) for the United States.

BLATCHFORD, J. The object of the proceeding authorized by the 14th section, and taken in this case, is to furnish the assessor with information from which to make a true return, so as to assess the proper tax. The section, after providing for the proceedings which have been taken in this case, declares that it shall be the duty of the assessor to enter the premises of any person rendering a false return, and to make, according to the best information which he can obtain, including that derived

from the evidence elicited by the examination of witnesses authorized by the section, and on his own view and information, a proper return and assess the proper tax, and to add one hundred per centum to such tax, in case of a false return having been made. The use of any entries in the books, and of any testimony given, is solely to furnish evidence for making a true return. If there were no entries in any books of account in the possession, custody or care of the relator, relating to the trade or business of the relator during the period named in the summons, the relator is not bound to produce them. But if there are any such entries, he is bound to bring the books. He refuses now to bring the books at all, while he does not deny that they contain such entries. He must, therefore, bring the books. But he is not at once obliged to submit the books or any of them to the inspection of the assessor or of any other person. The entries in question, and not the books, are the things sought for by the section. When the books are brought, the relator must appear with them under the summons to give testimony. He must then be asked whether there are any such entries as the summons specifies. If he says there are, he must then be asked to exhibit any entry or entries relating to a particular point or matter to be named in the inquiry, within the scope of the summons as to subject-matter and time. If he says that he cannot do so without criminating himself, or furnishing thereby a link in a chain of evidence which might criminate him, he is protected from exhibiting such entry or entries. And he is protected in like manner from giving testimony, in reply to any particular question put to him. If there be any entry as to which he does not claim protection, he is entitled, in disclosing such entry, to withhold and conceal all entries as to which he does claim protection. The power of the assessor under the 14th section, to make out a proper return on which to assess the tax, and then

to add one hundred per cent. to such tax in case a false return has been made, is ample, even in the absence of the books and testimony of the relator; and the withholding of such books and testimony, when an opportunity is offered to the relator to have the benefit of them, will warrant the assessor in making out a return on the best information he can obtain, and in assessing a tax thereon, and will deprive the relator of all ground of complaint as to the amount of the tax. In this view there could be no excuse for stretching the power of the assessor so far as to involve a violation of one of the fundamental principles of justice, that no person shall be compelled to give testimony which may tend to criminate himself. This may be done by exhibiting or disclosing an entry in a book as well as by testifying orally. The witness must be the judge of the effect of the disclosure or testimony, unless it is manifest that there is no ground for claiming the protection invoked. The relator must be remanded to the custody of the marshal until he attends before the assessor with the books referred to in the summons, and then the examination will proceed before the assessor in the manner herein indicated.

DECEMBER, 1868.

IN THE MATTER OF JOSEPH M. LANE, A BANKRUPT.

POWER OF REGISTER.—COSTS.

A register in bankruptcy has power to make an order directing an assignee in bankruptcy to pay fees of officers of Court out of moneys in his hands.

In this case the Register certified to the Court that the solicitor for the bankrupt had applied to him for an

order directing the assignee to pay certain fees of officers of the Court; that the assignee made no opposition, having sufficient funds in his hands; but that he (the Register) doubted his power to make the order and, therefore, without examining the items of the fees, certified the question to the Court.

BLATCHFORD, J. I think the Register has such power. It is fairly embraced within the power given to the Register, by section 4 of the Act, "to make all computations of dividends and all orders of distribution," and "to audit and pass accounts of assignees," and within the power given to him, by general order No. 5, to conduct proceedings in relation to the following matters, when uncontested, namely, "taking evidence concerning expenses and charges against the bankrupt's estate, auditing and passing accounts of assignees' proceedings for the declaration and payment of dividends." The doings of the Register therein are made, by general order No. 5, "subject to the control of the Court;" but, when there is no issue of law or fact raised and contested by any party in regard to the question, the Register has power to entertain it and make the order. The fees paid to the officers of Court, set forth in the bill of items, are fees which are embraced in the first subdivision in section 28, and that section directs that the order for a dividend shall direct the payment of those fees first in full by the assignee. An order for the assignee to pay those fees is an order of distribution, within section 4.

DECEMBER, 1868.

THE PROPELLER MARY SANDFORD—THE PROPELLER DORIS.

COLLISION ON LONG ISLAND SOUND.—STEAMERS MEETING.—CONFUSION OF SIGNALS.—LOOKOUT.

The propeller D., bound to New York, was on the north side of the channel east of Execution Light in Long Island Sound, heading southwest by west, when she discovered, about a point on her port bow, both the green and the red lights of the propeller M. S., which was also on the north side of the channel, heading northeast half north. The true course of the D., after passing the buoy at Execution Light, would have been southwest half south, but, as soon as she had passed the buoy, she ported her helm and blew one blast of her whistle. The answer to this was two blasts of the whistle from the M. S., to which the D. replied with a single blast, and immediately stopped and reversed her engine. The M. S. saw the lights of the D. a point or a point and a half on her starboard bow, she blew two whistles when about a mile off, and then, hearing the single whistle from the D., she again blew two whistles and starboarded, and, on hearing the second single whistle from the D., stopped and reversed her engine. Her first two whistles were not heard on board the D. The vessels came in collision, the stem of the D. striking the M. S. on her starboard bow:

Held. That the vessels were meeting end on or nearly so, and were both bound to port their helms, in accordance with the 13th Article of the Steering and Sailing Rules, and that the M. S. was in fault in starboarding;

That, if there is a confusion of signals between two approaching steamers, each vessel is bound to stop, as soon as it perceives the confusion, in accordance with the 16th Article;

That, the M. S. therefore, was in fault in not stopping and reversing her engine when she heard the first single whistle from the D., which she understood to be in answer to her first two whistles;

That, as each vessel saw the other at a sufficient distance, there was no question of lookout;

That the D. was not in fault.

BLATCHFORD, J. These are cross actions to recover damages for a collision which took place at about four o'clock on the morning of the 15th of September, 1865, between the steam propeller Mary Sandford and the steam propeller Doris, between Hart's Island and Execu-

tion Light in Long Island Sound. The Mary Sandford was on her way from New York to Boston, and the Doris was on her way from Boston to New York. The Doris was on the north side of the channel, heading southwest by west, and eastward of Execution Light, when she discovered ahead, about a point on her port bow, the lights of the Mary Sandford. Both the green and red lights of the Mary Sandford were visible from the Doris. Just to the westward of the place where the Doris was when she discovered the lights of the Mary Sandford, was a buoy off Execution Light, which buoy the Doris, in her course, would leave to the northward. Off the buoy, the course of the Doris, if nothing had intervened, would have been changed, by the chart, to southwest half south, a change of a point and a half to the southward from the course she had previously been running on, and which would have required, to effect it, a starboarding of her helm to an extent sufficient to produce such variation. But the Doris, having seen the Mary Sandford, and perceiving that the two vessels were meeting end on, or nearly end on, so as to involve risk of collision, obeyed the rule laid down by Article 13 of the "Steering and Sailing Rules" prescribed by the Act of April 29th, 1864, (13 *U. S. Stat. at Large*, 58,) and, inasmuch as the two vessels were steamers, put her helm to port, when she had passed the buoy and there was room for her to swing to the northward. At the same time, she blew one blast of her steam whistle, as an indication to the Mary Sandford that she was porting. In reply to this one blast from the Doris, there was heard on the Doris a signal of two blasts from the Mary Sandford, indicating to the Doris a confusion of signals and that the Mary Sandford was starboarding. The Doris immediately gave orders for her engine to stop and reverse, which orders were obeyed with all practicable rapidity, and she gave another single blast with her steam whistle and put her wheel hard-a-port. Before

her headway had been stopped entirely, her stem came in collision with the starboard side of the Mary Sandford, not a great way back from the stem of the latter, cutting into her some distance. Both vessels were damaged by the collision, the Doris less than the Mary Sandford.

The Mary Sandford, for some time before she sighted the lights of the Doris, and at that time, was also on the north side of the channel. Her course, at the time she sighted the lights of the Doris, was, as nearly as I can make it out from the evidence, about northeast half north, a course diverging a point and a half to the northward from a line parallel to what was the course of the Doris up to the time the Doris ported her helm after passing the buoy off Execution Light. This course of the Mary Sandford, if northeast half north, was parallel to what would have been the chart course of the Doris after passing the buoy off Execution Light, northeast half north being the counterpart of southwest half south; and, although the Mary Sandford was on the north side of the channel, it is not at all probable that, in the comparatively confined channel extending from off the southerly point of Hart's Island to off the buoy at Execution Light, she was running upon any other than the chart course, and the testimony also leads clearly to that conclusion.

The fact that the two vessels were in these respective positions and on these respective courses when they first sighted each other's lights is also made evident by the fact that these must have been their courses and positions or they could not have seen each other's lights in the respective bearings shown by the testimony. The testimony of those on board of the Doris is that they first saw the lights of the Mary Sandford bearing from a point to a point and a half on the port bow of the Doris. The testimony of those on board of the Mary Sandford is that they first saw the lights of the Doris bearing from

a point to a point and a half on the starboard bow of the Mary Sandford. These are just the bearings which the lights of each vessel would have had to the persons on board of the other vessel, if the course of the Doris had been southwest by west, and that of the Mary Sandford had been northeast half north.

On this state of facts, as the Doris was not far to the eastward of Execution Light when her lights were first sighted by the Mary Sandford, and the latter was at that time a considerably greater distance to the westward of Execution Light, it must have been, or ought to have been, quite apparent to those on board of the Mary Sandford, that the Doris, when compelled to change her course off Execution Light to correspond with the chart course from that point westward, would be brought to meet the Mary Sandford end on, or nearly end on, so as to involve risk of collision. This was apparent to those on board of the Doris, for her helm was put to port as soon as that manœuvre could be safely executed after passing the buoy off Execution Light. On the same state of facts, the helm of the Mary Sandford ought to have been put to port. Instead of this being done, her helm was starboarded, and she persisted in keeping it to the starboard and thus running across the proper and lawful course of the Doris, until the collision occurred. In thus starboarding her helm instead of porting it, the Mary Sandford violated the requirement of Article 13, before cited, and was in fault. The story of the witnessess on the part of the Mary Sandford, that they saw only the green light of the Doris, and did not see her red light at all, which is offered as an excuse for the starboarding of the Mary Sandford, on the idea that the Mary Sandford was some way to the northward of the course of the Doris, and therefore could not safely port, is not credible. Besides, the evidence shows satisfactorily that the single whistle of the Doris, indicating that she was porting, was heard on board of the Mary Sandford, before the helm of the Mary Sandford was starboarded.

The testimony shows, that the Mary Sandford blew a signal, of two blasts of her steam whistle, when she was about a mile off from the Doris; that that signal was not heard on board of the Doris; that, after the Mary Sandford had blown that signal, the Doris blew her signal of one blast, before-mentioned, which was blown at the same time that the Doris ported her helm; that that signal from the Doris was heard on board of the Mary Sandford, and was understood by those on board of her to be an answer by the Doris to the signal of two blasts blown by the Mary Sandford; that, on that signal of one blast, from the Doris being heard on board of the Mary Sandford, a second signal, of two blasts, was blown by the Mary Sandford, and her helm was starboarded; that this last signal, of two blasts, from the Mary Sandford, was heard on board of the Doris; that the Doris, on hearing it, immediately blew a second signal, of one blast and stopped and reversed; that this last signal from the Doris was heard on board of the Mary Sandford; and, that the Mary Sandford, immediately on hearing it, stopped and reversed. When a steam vessel is approaching another steam vessel, so as to involve risk of collision, and there is a confusion or misunderstanding apparent to either of them, in reference to the signals made by either, the necessity arises for stopping and reversing, on the part of the vessel which perceives such confusion or misunderstanding. Such necessity is the necessity referred to in Article 16 of the Act of April 29th, 1864, which provides, that "every steamship, when approaching another ship, so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse." The Doris perceived such confusion or misunderstanding of signals, when, and only when, after she had blown her first signal of one blast, she heard what was really the Mary Sandford's second signal of two blasts, and the Doris immediately, in compliance with the law, stopped and reversed. The Mary Sandford

perceived such confusion or misunderstanding of signals, when, after having blown her first signal of two blasts, she heard the Doris answer by a signal of one blast. But she did not then stop and reverse, as she ought to have done. On the contrary, she blew another signal, of two blasts, and then waited to hear the second signal of one blast, from the Doris, before giving the order to stop and reverse. This was another fault on the part of the Mary Sandford. If she had stopped and reversed when she heard the first signal, of one blast, from the Doris, as she ought to have done, there would, probably, have been no collision, even with the wrongful starboarding of the Mary Sandford.

I do not think the question of the lookout, on either vessel, has any bearing in the case. Each vessel saw the other at a sufficient distance off to make the proper manœuvres to avoid a collision.

It is urged as a fault, against the Doris, that her engine would not stop its forward motion, and take on a reverse motion, as quickly as some other engines would. But it is not shown that the engine was an improper or unsafe one, or that it was not in order. Nothing amounting to any fault is shown, in respect to the engine of the Doris; and the Court cannot speculate as to whether the Doris might not, with a different engine, have stopped short of colliding with the Mary Sandford.

There must be a decree, dismissing the libel against the Doris, with costs. In the case against the Mary Sandford, there must be a decree for the libellants, with costs, with a reference to a Commissioner, to ascertain and report the damages sustained by them, by the collision.

Benedict & Benedict, for the Doris.

Dudley Field and *Dimock & Whitney*, for the Mary Sandford.

Eastern District of New York,

DECEMBER, 1868.

IN THE MATTER OF JAMES BRODHEAD, A BANKRUPT.

ASSIGNMENT WITHOUT PREFERENCE.—INTENT OF BANKRUPT.—PRESUMPTION.

Where a bankrupt, who had failed on Feb. 25th, 1868, on that day made an assignment of all his property for the benefit of all his creditors without preference, and on Feb. 29th, filed his petition in bankruptcy:

Held, That even if the bankrupt could be allowed to show, that he had no intention, at the time of making his assignment, of filing a petition in bankruptcy, yet he had failed to show it. His denial of such intention, in the absence of any confirmatory circumstances, is not sufficient to repel the presumption which arises from the fact.

That, therefore, his discharge must be refused.

BENEDICT, J. This case comes before me upon specifications of certain objections to the discharge of the bankrupt. The main ground relied on in opposition to the discharge, arises under the first specification, which is, in substance, that the bankrupt, in contemplation of becoming bankrupt, made an assignment of his property for the purpose of preventing it from coming into the hands of the assignee in bankruptcy, and being distributed under the provisions of the Bankruptcy Act. The evidence bearing upon the specification as presented to me, consists solely of the testimony of the bankrupt given in writing, from which it appears that the bankrupt failed on the 25th day of February, 1868, for a large sum, and upon the same day executed a general assignment of all his property, then of the nominal value of over $100,000, and conceded to be of at least the value of $20,000, to one Peter Clogher, of Utica, in this State,

in trust for the benefit of his creditors, without preference. The assignment has not been produced before me, but its contents and effect are stated by the bankrupt and conceded by the counsel to be as above. This assignment was recorded in the county of Kings, being the county of the bankrupt's residence, on the 28th of February, 1868, and on the next day the bankrupt filed his petition in the Court, asking to be discharged of debts to the amount of half a million dollars, and averring that he had no property beyond a few articles of wearing apparel. Upon such a specification and such proofs, the only question which can be claimed to be open for consideration is as to the intent of the bankrupt in making his assignment to Clogher. Assuming that the provision of section 29 of the Bankruptcy Act, which forbids a discharge to a bankrupt who has made an assignment of his property in contemplation of bankruptcy, for the purpose of preventing his property from coming into the hands of the assignee, and being distributed under the Act, refers to an intention to file a petition in bankruptcy; and assuming also, for the purpose of this case, that this bankrupt can be permitted to show that the actual, and, under the circumstances, the necessary result of making his assignment, was not intended by him, by proving that he had at that time no intention of filing a petition, still it is manifest that the facts conceded here cast upon the bankrupt the burden of showing the absence of that intent. That burden has not been discharged. It is true that the bankrupt denies, in the words of the Act, the intention imputed to him, and declares that when he made the assignment he had no intention of filing a petition in bankruptcy, but he fails to show any change of circumstances between the making of his assignment on the 25th, and the filing of his petition on the 29th, which account for any change of intention. When he made his assignment he was hopelessly insolvent, and he must have known it,

and his denial of any intention then to take advantage of the Bankruptcy Act, however positive, is not, in the absence of any confirmatory circumstances, sufficient to repel the strong presumption which arises from the conceded facts. Moreover, the declaration of the bankrupt that he concluded on the 29th to take the benefit of the Act, because he saw statements in the newspapers that the fifty per cent. clause of the Act would go into effect the next day, shows affirmatively the existence of a previous intention to take advantage of the Act. It is, indeed, an extraordinary proposition that the Bankrupt Court can be asked to discharge a person from all his debts, who has, by an assignment to a private assignee, placed all his property where it can be administered only by the tribunals of the State. A system of bankruptcy, which would thus, in practice, permit a discharge of the debtor without a simultaneous administration and distribution of the property among the creditors, would be a monstrosity. Neither the spirit nor the letter of the present Bankruptcy Act permits such a proceding.

The discharge must be refused.

DECEMBER, 1868.

THE PROPELLER GRATITUDE.

Collision in the Kills.—Schooner and Steamer.—Lookout.—Sheer.

Where a collision occurred in the night, between a steamboat and a schooner, each party claiming that the other vessel sheered across the other's bows:

Held, That the fact that the sails of the schooner did not jibe, was sufficient to confirm the evidence from the schooner, that she made no change;

That the steward, who was standing by the companion way, and was no mariner, and had not been stationed as a lookout, was no proper lookout;

That the steamboat was in fault, in not having a proper lookout, and in not avoiding the schooner, and was liable for the collision.

BENEDICT, J. This is a cause of collision, instituted by Charles Bremner, owner of the schooner Genius, to recover of the propeller Gratitude the damages occasioned by the sinking of his schooner, in the Kills, on the night of June 3d, 1867. The theories and testimony of the respective parties are in direct conflict, and cannot be reconciled. I have, however, little hesitation in deciding between them, upon the pleadings and proofs, as they stand.

The evidence shows that, on the night in question, the wind was light, from the southwest, the tide running flood in the Kills, and it was not so dark but that lights of vessels could be seen at the distance of a mile at least. The schooner was running east, at the slow rate of about one mile an hour, with her boom off to the port. The propeller was running west, at the rate of about five miles an hour. The two vessels came in contact at right angles, with sufficient force to knock a man overboard, and to cut into the starboard side of the schooner, amidships, so that she sunk before she could be got to the shore.

The libellant insists that the vessels were brought in contact by the steamer's suddenly porting her helm, and attempting to cross the bows of the schooner, when close upon her. The claimant insists that it was done by the schooner, which attempted to cross the bows of the steamer, and bore away when so near that she could not be avoided, notwithstanding the engines of the propeller were at once stopped, and backed. It is clearly proved, in the case, by many witnesses, and disputed by none, that the schooner did not jibe, at any time, but that her boom continued off to port, without change. This circumstance is sufficient, in my mind, to confirm the very pos-

itive testimony of persons on board the schooner, that no change was made in the course of the schooner.

If this be true, it follows that the steamboat must be held in fault, for not avoiding the schooner, which could easily be seen. I have no doubt that the collision was the result of the sheer of the steamboat, when near upon the schooner, and that it was caused by the want of a careful lookout on the steamboat. No person was stationed forward, on the steamboat, to perform the duty of a lookout. The steward was forward, standing by the companion way, from which he had come out, and was looking out forward, he says; but he also says that he was not stationed there for that purpose, and that there was no lookout forward—in this, contradicting the pilot of the steamboat, who swears that he stationed the steward forward, as a lookout. This steward was no mariner, and it was no part of his duty to look out, and, manifestly, he was not stationed where he was for that purpose. The oath of the pilot, that he stationed the steward as a lookout, therefore, is well calculated to cast discredit upon the whole evidence. The preponderance of evidence being in favor of the libellant's story, the decree must be for the libellant, with an order of reference to ascertain the amount of damages sustained.

DECEMBER, 1868.

THE BARK WILHELMINA.

Charter and Bill of Lading.—Damage to Cargo.—Blowing.—Burden of Proof.

Where a vessel was chartered, in Buenos Ayres, to bring a cargo of hides to New York, the charter containing this clause: "The charterer furnishing the lining hides and bones for dunnage only;" and, after the vessel was loaded, ordinary

bills of lading were made out, consigning the cargo to the libellant; and, on delivery of cargo, part of it was found to be damaged:

Held, That, on the facts, the injury was caused by blowing, and that the dunnage was insufficient;

That, where it appears that damage has been caused by an ordinary occurrence on a sea voyage, the burden of proof is on the ship, to show that proper precautions were taken to guard against the danger;

That the clause above set forth had no effect to relieve the ship from the duty to properly protect the cargo, and that the consignees, not being parties to the charter, but claiming under clean bills of lading, would not be bound by that clause;

That the ship was liable for the damage.

BENEDICT, J. This action is brought to recover the amount of damage caused to a cargo of hides, while being transported in the bark "Wilhelmina," from Buenos Ayres to this port.

The vessel was chartered in Buenos Ayres, by H. J. Ropes, by a charter party, which provides that the vessel should receive from the charterer, "say 2,000 salted hides, and the balance of cargo of dry hides, the charterer furnishing the lining hides and bones for dunnage only."

The salted and dry hides were to pay freight; the lining hides and bones were to be freight free.

This cargo having been laden, bills of lading were issued for it, in the ordinary form, according to which it was to be delivered in New York, to the libellants, R. W. Ropes & Co., in like good order, dangers of the seas excepted; they paying freight for the salted and dry hides only. Separate bills of lading were issued for 160 lining hides, and for the shin bones, declaring them to be freight free.

The bones were stowed in the bottom of the ship, from forward to aft; upon these were placed the salted hides, also running from forward to aft, and, upon these were stowed the dry hides, filling the vessel, all being in good order when received.

Upon the discharge of the vessel, in New York, a few

wet hides came out, at the early part of the discharge, which were taken from the top of the cargo, aft, and which had beans sticking upon them; and, again, at the latter part of the discharge, damaged hides were reached. These, to the number of some 2,500, lay in the wings, on both sides, midships, and were wet with sea water, and seriously injured.

The real controversy, in the case, relates to these last-mentioned hides, inasmuch as it is quite manifest that the injury to the few which came out first, from near the after-hatch, was caused by the starting of the hatch in heavy weather, during the voyage, which permitted some water to pass on the hides below, carrying with it some beans, which had been placed near the hatch over the cargo.

As to the injury to the other portions of the cargo, I think it clear upon the proofs, that it did not arise from leaks in the decks, or top sides. There was some starting of these seams, but no amount of water appears to have passed through upon the cargo directly, for the top portions of the cargo, midships, were not wet. The damage was below, at the bottom of the dry hides, and above the salted hides.

Nor does it appear that the bark accumulated any considerable quantity of water in her bilges. The only entry in the log, upon the subject, is on one day, where it is noted that "Ship made more water than usual—kept the pumps a-going;" and no witness pretends that the pumps did not keep the water down, or that there was any considerable amount of water in her at any time. She was a new vessel. The damage was not caused by water from the decks, but by blowing. This is evident, from the position of the damaged hides, which were next the ceiling, and about the bilges.

Now, blowing is one of the ordinary occurrences on a sea voyage, and injury from it can be provided against, by proper dunnage. (*Bearse* v. *Ropes*, *Sprague*, 332.) The

burden of proof, therefore, rests upon the claimant to show that proper precautions were taken to guard against this danger.

This has not been shown. On the contrary, it clearly appears that the dry hides were stowed with lining hides nailed between them and the sides of the ship, but with no or at most but very little wood dunnage between the hides and the ceiling. This appears from the testimony of persons who saw the vessel discharged; of a stevedore, who loaded the cargo in part, and refused to continue, because he was not furnished with dunnage; by the testimony of the master, who, although often on board while the vessel was loading, is unwilling to say that any wood dunnage was used for the dry hides. The evidence, upon this point, produced by the libellant, clearly outweighs the evidence introduced by the claimant, to show the presence of wood dunnage. Indeed, the attempt, on the part of the claimant, to prove that the cook, during the discharge, used up the wood, as fast as it was thrown out, to heat his galley, shows that there was an insufficient quantity for such a cargo, in such a vessel.

The use of wood dunnage, inside of the lining hides, to protect hides from damage by blowing, is proved to be a common precaution, and the absence of such a precaution is negligence, which renders the ship liable for any damage resulting therefrom. But, it is said that in this case, the charter party provided that the charterers were to furnish lining hides, and bones for dunnage, and the ship, having used all that were furnished for that purpose, is not responsible for the deficiency in quantity. To this argnment, there are two sufficient answers: first, that the consignees are not shown to be parties to the charter party. They claim under clean bills of lading, which make no allusion to dunnage, or to a charter party; and, second, that the clause referred to, in the charter party, has no effect to

relieve the ship from the duty to properly protect the cargo. I think the clause, fairly construed, is only a provision that the ship shall take, free of freight, and be permitted to use for dunnage such lining hides and bones or horns as may be furnished and can be so used, and that it in no way relieved the ship from the obligation to properly stow the cargo with proper dunnage.

My conclusion, therefore, is, that the ship must be held liable for the injury caused to the dry hides on board, excluding those which were discharged from about the after hatch.

Let there be a reference to ascertain the number of those hides, and the amount of damage thereto.

DECEMBER, 1868.

THE SCHOONER EDWARD LEE.

SALVAGE.—ASSIGNMENT OF SALVOR'S CLAIM.—RELEASE.—ORDER TO REPAY SALVAGE INTO COURT.—DISTRIBUTION.

Where a bark picked up, at sea, a derelict schooner, and, putting a crew on board of her, sent her to New York, where she was libelled for salvage, in the name of the master and owners of the bark, for the benefit of all concerned, and the amount of salvage decreed was, in pursuance of an order of Court, paid over to the libellant's proctor, and by him to the owners, no order of distribution of the salvage having been entered, and, subsequently, one of the crew petitioned the Court that the owners repay into Court his share of the salvage, and the owners set up an assignment of the seaman's claim to them, which, it appeared, was executed in a foreign port, at the request of the master, and in ignorance of the facts as to the salvage suit; and also set up a release of the claim, executed by the seaman, after the return of the bark to New York, which was also executed in ignorance of the facts:

Held, That the payment of the money out of Court, without an order of distribution, was an oversight, as well on the part of the Court, as of the proctor;

That the assignment and the release could not avail to deprive the sailor of his share in the salvage, and that a sufficient amount to pay him that share must be repaid by the owners into Court.

The Schooner Edward Lee.

THIS case came before the Court, upon the petition of Nicholas Thompson, one of the crew of the bark "Ada Carter," praying that the agents of that vessel, who were also part owners, might be compelled to repay into the registry of the Court, for the benefit of the petitioner, a proper portion of a certain salvage award, which was made by this Court, in favor of the master, owners, and crew of the "Ada Carter," but in which said part owners refused to allow the petitioner to participate.

The petition was opposed, upon the ground that the petitioner had parted with all his interest in the salvage award.

It appeared, by the evidence, that the bark "Ada Carter," while at sea, picked up a derelict, put on board thereof a mate and two seamen, and sent her to the port of New York, where she arrived in safety, and was libelled in this Court for salvage, the libel being filed in behalf of the owners and master, for themselves and all others interested.

Pending this proceeding, the owners wrote to the master, at Cuba, announcing the safe arrival of the derelict in New York, and that they had demanded $8,000 salvage, and hoped to realize $4,000, and suggesting the procurement, from the seamen, of an assignment of their interest. A written assignment of all the interests of master, mate, and crew, to one of the owners, for $25 each, was thereupon prepared, and signed by the master, mate, and then by the crew, no money being then paid, but the master going through the form of handing $25 to each seaman, and taking it back at the same moment, with the promise to give it to him in clothes, or at the end of the voyage.

The bark and crew arrived back in New York, in May, and about the 20th of May, the crew, including the petitioner, were paid off by the master, in the stream, each receiving his balance of his wages, and $25 besides.

The petitioner then signed a receipt, in full for all demands arising out of services, salvage claims, assaults, batteries, &c., &c., objecting, however, at the time, that he was entitled to more for the salvage. At the time of this payment, although the sailors did not know the fact, the wreck had been condemned in the salvage suit, and the amount of salvage to be paid had been agreed on, between the libellants and claimants in that suit, in pursuance of which agreement, within four or five days, the sum of $4,150, in addition to the costs, was drawn out of the registry, by the proctor for the salvors, and the same sum, less expenses, paid over by him to the agents of the vessel.

The petitioner, subsequently learning of the salvage award, demanded of them a proportionate share, and being refused, applied to the Court for relief, upon petition, and proved the foregoing facts.

For petitioner, *O. B. Wilcox.*

For the owners, *E. C. Benedict.*

BENEDICT, J. Although there may, perhaps, be cases where an assignment, obtained from a seaman, by the master, for the benefit of an owner, of the seaman's share of a salvage claim, can be upheld, this is no such case.

This owner, when he sought to procure the assignment from the petitioner, for $25, expected, as his letter shows, that the salvage award would be $4,000, and he had made a claim for $8,000, but neither he nor the master gave to the seaman any hint that the claim would amount to any such sum, when they procured the assignment, in Cuba. The execution of the assignment was induced by the master himself, and also the mate, falsely pretending to assign their rights also, for the same sum, and the transaction, as conducted, was a

sham, intended so to be treated by all, except the seamen. The master treated it as a sham, for he has since received $400 for his share of the salvage. The mate treated it as a sham, for he has since received $200 for his share of the salvage. The owners treated it as a sham, for they divided the rest of the money among them. Houghton, the assignee, has treated it as a sham, for he does not pretend, and has never pretended, to be entitled to the interest which the assignment purports to convey to him. This petitioner may also treat it as a sham.

It was made in ignorance of facts, which, if made known, would have prevented its execution, and these facts were then within the knowledge of the parties engaging in its procurement, and it was a contrivance far from creditable, either to the owner, who suggested it, or the master, who consented to carry it into execution. Such a transaction will never, in this Court, be permitted to stand for a moment between a seaman and a sum awarded to him for meritorious salvage services. It is for the interest of commerce that seamen, of all others, reap the benefit of that provision of the maritime law, which gives salvage rewards to encourage efforts in behalf of vessels in distress, and any assignment which has the effect to deposit the reward in the pockets of the owners, in order to be sustained in a Court of Admiralty, of which all sailors are the wards, must bear unmistakable marks of good faith and fair dealing.

Nor is the case helped by the fact that, after the arrival of the bark in New York, the petitioner was paid the $25 by the master, while in the stream, and then signed a receipt in full of all demands, including any demand for salvage. At this time, the money had not been paid over to the owners, although they undoubtedly knew how much it was, by agreement, to be. The petitioner, then, had no claim against them to release. His claim was in suit against the derelict, and the libellant's

proctor was his proctor, as the owners knew. The receipt neither released the owners from any thing, nor did it purport to authorize them to receive from the proctor the petitioner's share of the award, when it should be made.

The receipt, and the payment, can have no effect to work a transfer of the interest to the owners, for the sailor was not then informed of the fact that the derelict had been sold, and the award agreed on at $4,150, nor was his proctor consulted.

The right of the petitioner to participate in this award, as one of the original salvors, then remains unimpaired, and as the owners, who received the money from his proctor with full knowledge of all the facts, refused to allow him to participate, they must be compelled to repay into the registry of the Court, within 48 hours from the service of the order of this Court, the sum of $350, for the benefit of the petitioner.

It should be added, that it was an oversight, on part of the proctor for the salvors to draw the whole award from the registry, without having previously, for his own protection, applied for, and obtained, an order of distribution, fixing the portion payable to each salvor; and it was also an oversight, on the part of the Court, to permit the money to be drawn, before such distribution had been made.

Southern District of New York.

JANUARY, 1869.

THE UNITED STATES *vs.* VERNON K. STEVENSON.

SEIZURE OF ENEMY PROPERTY ON LAND.—FORFEITURE.—ACTS OF JULY 13th, AND AUGUST 6th, 1861, AND MAY 20th, AND JULY 17th, 1862.

The seizure of enemy property as prize of war on land is not authorized by the law of nations, and can only be upheld by the municipal laws of the nation which seeks to enforce the forfeiture.

Where a statute denounces a forfeiture of property as the penalty for an offence, and does not say that the property *or its value* is forfeited, the forfeiture takes place at the time the offence was committed, and operates as a statutory transfer of the right of property to the Government.

The Act of July 13th, 1861, (12 *Stats. at Large*, 255,) was not a mere temporary Act. Forfeitures incurred under it during the continuance of hostilities might be enforced afterwards.

The 5th and 9th sections of that Act must be construed together, and the forfeiture declared in the 5th section can be enforced only by a seizure of the property.

The Act of August 6th, 1861, (12 *Stats. at Large*, 319,) May 20th, 1862, (*Id.* 404,) and July 17th, 1862, (*Id.* 589,) are subject to the same construction, and forfeitures under them can only be enforced by a seizure of the property.

This suit was a suit in trover brought by the Government against the defendant to recover the value of 1,000 bales of cotton, alleged to have belonged to the Government and to have been converted by the defendant to his own use. The ground taken by the Government was, that the defendant, being President of the Nashville and Chattanooga Railroad, came into possession of the cotton, which had belonged to the Confederate Government, and thus, by right of forfeiture, to the Government of the United States, and that he brought the cotton to

New York and there disposed of it and kept the proceeds.*

The case was tried before a jury, and Judge BLATCHFORD delivered the following charge :

Gentlemen of the Jury: The right of recovery, in this case, on the part of the Government, rests upon municipal statutes, because the action, although not a suit *in rem*, following a seizure of property on land, is sought to be made equivalent to such a suit. The case, therefore, does not fall within the class of suits which follow captures of property on the sea, *jure belli*, under the law of prize. The law in regard to captures of property on land, which is claimed to be forfeited to the Government under the operation of the rules of war, has been settled by the Courts of the United States, by repeated adjudications; and the Government must recover, if at all, in this case, precisely as if it had now under seizure the cotton in question. The Government claims that the defendant has taken the cotton and disposed of it to his own use, and that it has the same right to maintain this action of trover against the defendant, for the conversion of the cotton, as it would have had to maintain a suit *in rem* against the cotton, or as it would have had to maintain a suit against the defendant for the conversion of the cotton, if, after a decree of condemnation of the cotton, in a suit *in rem* against it, and before a sale of it, the defendant had got possession of it and converted it to his own use.

As early as the year 1814, in the case of *Brown* v. *The United States*, (8 *Cranch*, 110,) it was held by the Supreme Court of the United States, that the seizure of enemy property as prize of war, on land, *jure belli*, is not

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* An attachment was issued at the beginning of the suit, under which real and personal estate belonging to the defendant was seized. After the trial of the cause, a motion was made to dissolve the attachment. Judge Blatchford's decision, denying the motion, is reported in 1 *Abbott's U. S., Rep.*, p. 495.

authorized by the law of nations, and can only be upheld by the municipal laws of the nation which seeks to enforce the forfeiture. That decision and the doctrine of it were cited and approved by Mr. Justice Nelson, in the Circuit Court of the United States for this District, in May, 1865, in the case of *The United States* v. 1756 *Shares of the Capital Stock of the Great Western Railroad Company of Illinois* (5 *Blatchf. C. C. R.* 231.) That was a suit *in rem*, prosecuted under the confiscation Acts of August 6th, 1861, (12 *U. S. Stat. at Large*, 319,) and July 17th, 1862, (*Id.*, 589.) In his opinion in that case, Mr. Justice Nelson, speaking of those Acts, remarks, that they expressly provide that the proceedings under them shall conform to the proceedings in admiralty and revenue cases; and the conclusion he draws, and it is one which applies to all the confiscation Acts relied on in this case, from the Act of 1861 down, is, that these Acts are nothing but an extension, by Act of Congress, to enemy property captured on land, of the rule which, according to international law, had always been applied to enemy property captured at sea, and that the same rules must be applied in both cases. It necessarily follows, that the right which the United States are seeking to enforce in this suit, and the rights which they would seek to enforce by a suit *in rem*, if they had seized this cotton under these laws, are rights which rest wholly upon statute law.

It has been held by the Supreme Court of the United States, in the case of *The Reform*, (3 *Wallace*, 617,) that the Act of July 13th, 1861, (12 *U. S. Stat. at Large*, 255,) which is one of the Acts on which the Government relies for a recovery in this case, was not a mere temporary Act; and that, although the restrictions upon commercial intercourse prescribed by that Act were limited in duration to the period of the existence of hostilities, still, forfeitures incurred under it during the continuance of hostilities may be enforced afterwards.

Therefore, in a proper case, the Government could now enforce a forfeiture incurred by the defendant in respect to property, notwithstanding the proclamations of the President in regard to the cessation of hostilities. But the difficulty in the present case lies here, that the Government has failed to prove the first material allegation in the information; and that is, that they are entitled to the possession of this cotton in such a manner that they have a right to enforce that right of possession in this action.

The 5th section of the Act of July 13th, 1861, declares, that all property in transit to or from any insurrectionary State or section shall be forfeited to the United States. It was held in one case by Chief Justice Taney, in the Maryland District, (*United States* v. 2,000 *Bushels of Wheat*, cited in *United States* v. *Schooner Francis Hatch*, 13, *Am. Law Reg.*, 291, 292,) that the proper interpretation of that 5th section is, that no property can be condemned under it unless such property be actually seized while in such transit. But, without passing upon that point, I am entirely satisfied, (notwithstanding the declaration, in the 5th section of the Act, that, for the offence defined therein, the property shall be forfeited to the United States,) that, inasmuch as the title of the United States must be based wholly upon the statute, the whole statute must be construed together. The 9th section must be construed in connection with the 5th section. The 9th section provides, "that proceedings on seizures for forfeitures under this Act may be pursued in the Courts of the United States in any district into which the property so seized may be taken and proceedings instituted; and such Courts shall have and entertain as full jurisdiction over the same as if the seizure was made in that district." My view of this statute is, that it clearly contemplates that the forfeiture declared in the 5th section is to be enforced only by a seizure of the property; and that such forfeiture cannot be enforced in

any other manner. Inasmuch as the whole right is statutory, if Congress has seen fit to limit the statutory right to a forfeiture to be enforced only by a seizure of the property, the United States are so limited; and, inasmuch as that is their only right, if they are unable to seize the property, their right does not come into being, but remains an imperfect right. Congress has not seen fit to go any farther than to say: "You shall have this forfeiture if you seize the property." But if, for any reason, whether from the act of the defendant himself, or from any cause whatever, the Government cannot seize the property, it cannot enforce the forfeiture.

This view is entirely consistent with the decisions that have been referred to by the counsel for the Government, in reference to the time when a forfeiture declared by statute in favor of the Government takes effect. The general language of all those decisions is, that where a statute denounces a forfeiture of property, as the penalty for the commission of an offence, if the denunciation is in direct terms, and not in the alternative, that is, if the statute does not say that the forfeiture shall be of the property or its value, the forfeiture takes place at the time the offence was committed, and operates as a statutory transfer of the right of property to the Government. But, in every one of the cases cited, and in all the cases on the subject, in the Courts of the United States, which have fallen under my observation, in the first place, the proceeding was *in rem*, and, in the second place, the question always came up upon the point as to whether, in such proceeding *in rem*, the title of the Government to the property, and to a decree condemning it as forfeited, could be cut off by reason of the intervening, after the commission of the offence, of the title of a *bona fide* purchaser. It is only in respect to such a question that the decisions have been made. The principle is a sound one, unquestion-

ably, and the whole subject has been fully considered in an opinion given by the District Judge of the District of Kentucky, (Judge Ballard,) in the case of *The United States* v. 56 *Barrels of Whiskey*, (15 *Am. Law Reg.*, 32.) In that case, which was a suit *in rem* for a forfeiture of whiskey, a person claimed to be a *bona fide* purchaser of the whiskey, and that his purchase before prosecution, though after the commission of the offence, cut off the title of the Government; but the Court decided in favor of the Government and against the claimant. In the case of *Caldwell* v. *The United States*, (8 *Howard*, 366,) which is one of the leading cases on the subject, the opinion of the Court was delivered by Mr. Justice Wayne, and all that he says on the point must be taken together. He says: "The forfeiture is the statutory transfer of right to the goods at the time the offence is committed. If this was not so, the transgressor, against whom, of course, the penalty is directed, would often escape punishment, and triumph in the cleverness of the contrivance by which he has violated the law. The title of the United States to the goods forfeited is not consummated until after judicial condemnation; but the right to them relates backward to the time the offence was committed, so as to avoid all intermediate sales of them between the commission of the offence and condemnation." That decision cannot be considered as going any farther than the question then before the Court; and it is, in my judgment, contrary to principle and precedent to hold, that the United States can enforce a right of property, in a suit of the kind now on trial before this Court, by claiming that the forfeiture, solely as between themselves and the defendant, was complete and perfect at the time of the commission of the offence, without any judicial proceeding to enforce such forfeiture.

But, even if the rule could be different under some statutes, I do not think it could be different under this statute of 1861, because, the forfeiture provided for by

the 5th section of that Act, taken in connection with the 9th section, is a forfeiture that can be enforced only by a seizure of the property.

I now pass to the Act of May 20th, 1862, (12 *U. S. Stat. at Large*, 404.) Even if the regulations of the Secretary of the Treasury, made under the Acts of 1861 and 1862 and other Acts, are to be considered as matters of which the Court can take judicial notice, because they are expressly referred to by their dates, and adopted, in the third section of the Act of July 2d, 1864, (13 *Id.*, 376,) and even assuming that this cotton would have been forfeitable by virtue of regulations made by the Secretary of the Treasury in pursuance of the Act of 1862, still that Act is subject to the same construction as the Act of 1861; and, although the 3d section of that Act declares that property which shall be transported in violation of the Act, or of any regulations of the Secretary of the Treasury established in pursuance thereof, shall be forfeited to the United States, yet the 4th section of the Act says, that "the proceedings for the penalties and forfeitures accruing under this Act" (covering those accruing under regulations to be established by the Secretary of the Treasury, as well as those accruing under the Act itself,) "may be pursued * * * * in the modes prescribed by the 8th and 9th sections of the Act of July 13th, 1861, to which this Act is supplementary." Therefore, in this respect, the construction of the Act of 1862 must be the same as that of the Act of 1861. The proceedings for a forfeiture under the Act of 1862 must be pursued in the manner prescribed by the 9th section of the Act of 1861, that is, by seizure, and in no other way.

The next statute is the Act of August 6th, 1861, before referred to. That Act provides, that if any person, during an insurrection, after the President shall have declared by proclamation that there is an insurrection, shall acquire, sell, or give any property to aid the insurrection,

the President shall cause such property to be seized, confiscated, and condemned, and that the condemnation shall take place in the District or Circuit Court of the United States having jurisdiction of the amount, or in admiralty, in any district in which it may be seized, or into which it may be taken and proceedings first instituted. The statute does not declare any forfeiture at all. It merely provides that the President may cause any property to be seized; and, unless he causes it to be seized, the statute does not cover it at all. Therefore; it is plain that there can be no suit or recovery founded on that Act, unless the property is first seized.

The remaining Act is the Act of July 17th, 1862, before referred to, the 5th section of which provides, that "to insure the speedy termination of the present rebellion, it shall be the duty of the President of the United States to cause the seizure of all the estate and property, money, stocks, credits, and effects of the persons hereinafter named in this section," (including persons thereafter acting as officers of the army or navy of the rebels in arms against the Government of the United States,) "and to apply and use the same and the proceeds thereof for the support of the army of the United States." No forfeiture is declared by that Act, in any other language. It merely states that the President may seize the property and apply it to the support of the army of the United States.

As it does not appear, in this case, that any of the cotton was seized, these views of the various statutes relied on by the Government seem to me to dispose of this case. They lie at the very threshold of it, without the examination of any other questions.

The theory upon which the information in this case proceeded when it was filed, if that theory can be judged of from the information and the affidavit appended to it —for, the information refers to and embodies the affidavit as a part of the information, and the affidavit refers

to and embodies the information as a part of the affidavit —is, that this cotton was the property of the public authorities concerned in the rebellion, and that the United States, by virtue of their sovereign right, became the owners of the cotton, *eo instanti*, at the very moment the rebel authorities claimed to own it. Such a right in the United States, if it existed in this case, would not at all depend upon any of the statutes which have been cited; and, if it were shown, in point of fact. by the testimony in this case, that this cotton belonged to the acting public authorities who were carrying on the rebellion, and calling themselves the Confederate Government, the right of the United States, by virtue of their being the sovereign power, and by reason of such acting public authorities being rebel authorities, would come into operation over the property, by virtue of the Constitution of the United States, and of their sovereign authority, irrespective of any statute, so as to make the subsequent conversion of the property by the defendant a tort, as against the immediate right of possession of the United States. But there is no such testimony in the case. The evidence is quite clear that none of the cotton, for the proceeds of which the Government sues in this case, was the property of this so-called Confederate Government, or of any of its subordinate governments acting in rebellion and hostility to the United States.

Therefore, as I before remarked, the right which lies at the threshold of the claim of the Government to recover in this case, being a right resting wholly on the statute, and such right not being supported by any statute, even conceding all the facts to be as shown by the Government, it is the duty of the court to instruct you, upon the facts and the law, that the Government cannot recover, and that the defendant is entitled to your verdict. I should hesitate so to direct you in a case like this, if I were not entirely satisfied that the Government cannot recover in it under any circumstances. I, therefore, direct you to find a verdict for the defendant.

The jury, under the foregoing instructions, rendered a verdict for the defendant.

The case was taken, by writ of error, to the Circuit Court, which, in October, 1869, affirmed the judgment. The following was the opinion of that Court:

NELSON, J. This is a writ of error to the United States District Court of the Southern District of New York. The suit is an action of trover, brought by the United States against Stevenson, to recover the value of a large quantity of cotton, which, it is alleged, belonged to the plaintiff, and had been converted by the defendant to his own use. The cause was tried before a jury, and, on the trial, it appeared that the defendant, being a resident and citizen of Tennessee when the recent civil war broke out, remained in the State, and took part with the insurgent States, and was the president of the Nashville and Chattanooga Railroad, and ran the road in their service; and that, while thus engaged, he bought cotton within those States, and shipped it, with the knowledge and assent of the so-called Confederate States, from Wilmington, North Carolina, to foreign ports, in violation of the United States' blockade. It also appeared that, as the Union army approached Tennessee, and Nashville, he removed cotton that he had bought, and cotton also that belonged to others, further into the interior, to prevent the same from being captured by the forces of the United States. There is no proof in the case, that any part of the cotton was ever in the possession of the United States, or that they ever had any title to the same, or that it ever belonged to the so-called Confederate States, but, on the contrary, it was purchased in the Confederate States, by the defendant, and shipped by him abroad, in violation of the existing blockade, and sold abroad, or sold within the said States. The Court below, at the close of the testimony, being of opinion that no case was made out on the part of the plaintiffs, directed a verdict for the defendant.

The Act of July 13th, 1861, section 5, made it lawful for the President of the United States, where a state of insurrection existed, to declare it by proclamation, and provided that, thereupon, all commercial intercourse by

and between the same, and the citizens thereof, and the citizens of the rest of the United States, should cease, and be unlawful, &c., and the goods, &c., coming from said State or section into other parts of the United States, &c., should be forfeited to the same. (12 *U. S. Stat.*, *p.* 255.) The Act supplementary, passed May 20th, 1862, (*Id.*, *p.* 404,) section 3, confers on the Secretary of the Treasury the power, upon satisfactory grounds of belief that the goods, &c., are intended for any place in the possession or under the control of the insurgents, in all cases where he may deem it expedient to do so, to require security that they will not be carried to such place, nor used to give aid or comfort to the insurgents; and provides that a transportation in violation of the Act, or of the regulation, shall work a forfeiture.

The Act of August 6th, 1861, (*Id.*, *p.* 319, *sec.* 1,) provides that, during the insurrection, goods purchased or sold with intent to use or employ the same, &c., in aiding or promoting the insurrection, shall be subject of prize and capture, and it is made the duty of the President to cause the same to be seized and confiscated.

The Act of July 17th, 1862, (12 *Id.*, *p.* 591, *sec.* 6,) makes the property of persons engaged in the rebellion, who will not return to their duty in sixty days after warning by proclamation of the President, subject to seizure, and it is made the duty of the President to seize, &c.

The only remaining Act that it is material to refer to is that of March 3d, 1863, section 1, (*Id.*, *p.* 820,) which authorizes the appointment of agents to collect captured and abandoned property.

I need hardly say, that neither of these statutes, or any provision in them, has any bearing on the facts, as disclosed in the case, or affords any ground for an inference or conclusion that the cotton in question, sold and converted to his own use by the defendant, belonged to the United States. Certainly not, unless all the property of citizens or people in the Confederate States belonged to the United States during the war.

There is another branch of this case that furnished, perhaps, the grounds for its original institution, which, as has turned out in proof, has utterly failed. The original information, as it is called, went on the ground that the

defendant had fraudulently converted the cotton to his own use, and that the proceeds were disposed of with intent to secrete the same, and defraud the Government, and prayed for process of attachment against the property of the defendant. Thereupon process of attachment issued, and a large amount of real and personal estate was attached, and still remains under the said process. The affidavit upon which this process was issued is remarkable, when compared with the facts of the case, as proved before the jury. The affiant states, that he was the person who filed the information against the defendant, which was on the 17th of December, 1866; that 3,000 bales of the cotton, or thereabouts, being in the States of Georgia, Alabama, and Tennessee, were the property of the Confederate States, when the defendant took possession of it; that, in the summer of 1865, he transported the same to the city of New York, within the Southern District of New York, to be sold and disposed of at that city, and converted the cotton into money, the proceeds of which, amounting to $1,000,000, or thereabouts, the defendant received, and has converted the same into real or personal estate in that city; that the cotton was brought into the State of New York from the insurrectionary States, in violation of the proclamation of the President, of the 16th of August, 1861, and of the Acts of Congress, (referring to them;) and that it was the property of the United States. It was upon this affidavit that the process of attachment was issued, which seems to have been in some way regarded as a seizure, not of the cotton, but of the real and personal estate of the defendant, as a substitute for the same; and yet, the case has been tried as a simple action of trover and conversion *in personam.*

The case, as tried in the Court below, and as ruled by the learned judge, is a very simple and plain one, and, in every aspect in which it has been presented, on the testimony, can lead to but one result, and that is, that the United States showed no title to the property, or to the possession of it, which was indispensable to maintain this action.

As it is shown that the affidavit on which the process of attachment issued was wholly untrue and false, or mistaken, the process of attachment must be set aside and discharged. Instead of the cotton belonging to the Confed-

erate States, it belonged to the defendant; and, instead of being shipped to New York in violation of the Acts of Congress, it was shipped from a Confederate port to a foreign country, in violation of the blockade of the port of Wilmington; but this fact could not change the title of the property, or work a forfeiture of the same to the United States, unless seized as prize of war.

The judgment below is affirmed, and the process of attachment is set aside and discharged.

JANUARY, 1869.

IN THE MATTER OF JOHN A. MACHADO, A BANKRUPT.

BANKRUPT'S OATH.—WITHDRAWAL OF OPPOSITION.

Where, after a bankrupt had taken the oath required by the 29th section of the bankruptcy Act, a creditor filed specifications of opposition to his discharge, alleging, among other things, wilful false swearing in the affidavits annexed to the petition and schedules, and afterwards withdrew his appearance in opposition and the specifications:

Held, That the oath of the bankrupt, under that section, ought to be taken anew, after such withdrawal.

BLATCHFORD, J. In this case, the oath of the bankrupt required by the 29th section of the Act was subscribed and taken on the 3d of December, 1868. Specifications in opposition to his discharge were filed on the 4th of January, 1869, by a creditor, alleging, among other things, wilful false swearing in the affidavits annexed to his petition and schedules, in certain particulars. The case then came before me and was ordered to stand for hearing on the specifications, with leave to take testimony. On the 19th of January, 1869, the creditor withdrew in writing his appearance in opposition and the specifications. No new oath of the bankrupt under sec-

tion 29 is presented. I think, in view of the fact that the 29th section specifies as a ground for withholding a discharge, that the bankrupt, or some person in his behalf, has procured the assent of a creditor to the discharge, or influenced the action of a creditor, at some stage of the proceedings, by a pecuniary consideration or obligation, and that the same ground is made, by section 34, a ground for setting aside and annulling the discharge after it is granted, that, in this case, and in all cases where specifications such as those in this case are put in and are afterwards withdrawn, the oath of the bankrupt required by section 29 ought to be subscribed and taken after the withdrawal. A decision in this case is, therefore, suspended, to allow the defect to be supplied.

A. W. Speir, for the petitioner.

JANUARY. 1869.

THE UNITED STATES *vs.* ALVAH BLAISDELL, JOHN J. ECKEL AND JOHN McCLAREN.

INTERNAL REVENUE LAWS.—FRAUDULENT REMOVAL OF SPIRITS.—AIDING AND ABETTING.—EVIDENCE OF ACCOMPLICES.—PLEDGES OF PROTECTION.—U. S. DISTRICT ATTORNEY.—SENTENCE.

Under the 45th section of the Internal Revenue Act of July 13th, 1866, (14 *U. S. Stat. at Large p.* 163,) the "place where spirits are distilled" is the distillery premises.

Under that section, a person cannot be convicted as a principal in removing spirits, and also as an aider and abettor in the same offence.

Under that section, any one who had an interest in the distillery, if he directed, ordered or set on foot the removal of spirits, may be convicted of such removal, though not personally present.

Any one personally concerned in handling the means of removing spirits is guilty of removing spirits, whether he is interested in them or not.

Any help or assistance, other than what is a removal, is an aiding in a removal;

and giving any encouragement or instigation to commit a removal, other than what is defined to be a removal or an aiding in a removal, is an abetting in a removal.

Unless the date, stated in an indictment, is of the essence of the crime, it need not be proved as alleged.

It is never safe to convict upon the uncorroborated evidence of a single accomplice.

Affidavits and statements previously made by witnesses, which contradict their evidence given on the stand, are to be considered by the jury for the purpose of finding out what is the truth; but the evidence of the witnesses on the stand is not necessarily to be rejected on account of such contradiction. If, after having ascertained what is the truth, the jury find that a witness has wilfully told a falsehood on the stand, as to a material fact, they have a right to believe that he is not worthy of credit in any particular.

Courts of the United States cannot be called upon to redeem pledges of protection which have been given to criminals by the Executive Department. Such pledges must be redeemed by the Executive Department.

The Court can communicate with the Executive authorities of the Government, only through the District Attorney as the recognized officer of the Government.

Where a criminal is convicted of several offences, under several counts of an indictment, he may be sentenced under the first count, and sentence may be suspended upon the conviction under the other counts till after the first sentence has been fully executed.

THESE defendants were indicted under the forty-fifth section of the Internal Revenue Act of July 13th, 1866, for violations of that law in connection with a distillery in Christopher Street, New York. The distillery ran during August, September and October, 1867, and was seized on November 3d, 1867. After being condemned it was sold and ran again during April and May, 1868, when it was again seized. The indictment in this case contained eight counts, three founded upon a removal of spirits from the place where they were distilled to a place other than a bonded warehouse, (one of them during the first run, and two under the second run, of the distillery,) three for aiding and abetting in such removal, (two under the first run and one under the second,) and two for failing to keep proper books. These last, however, were not sustained by evidence and were not submitted to the jury.

Judge BLATCHFORD, in charging the jury, after speaking of the importance of the case, and detailing the different counts of the indictment, proceeded as follows:

The question of time and date, as specified in the indictment, is of no consequence at all in this case. The date alleged in the indictment, in respect of the first run, is the 27th of October, 1867. The dates of removal during the second run are alleged in the indictment to be, one of them, the 1st of April, 1868, and the other the 1st of May, 1868. The date of the aiding and abetting during the second run is alleged to be the 1st of April, 1868. It is necessary, in an indictment, to allege a date, but, unless the date is of the essence of the crime, it need not be proved as alleged. In this case, the dates alleged in the indictment are not at all of the essence of the crime, provided the offence was committed within the statutory time within which a prosecution must be had, which is two years in regard to these offences.

None of the defendants can be convicted of a larger number of single offences than are laid in the indictment; and each count must be considered as charging a single offence. Thus, the first count, that on such a day the defendants removed spirits, is supported by testimony that on any day during the first run they removed spirits from the distillery otherwise than into a bonded warehouse, with intent to defraud the United States. The same is true in regard to the counts for aiding and abetting.

(The Judge then went over the evidence which had been offered, as to the manner in which whiskey could be removed from the distillery by means of a certain pipe and hose, and then proceeded :)

In the investigation of all crimes, the fact that the crime could be committed, that the circumstances surrounding the place where it is alleged to have been committed, were such that the crime could be committed, is always an important circumstance, and is

the first subject of inquiry. Thus, in the present case, if it was impossible that whiskey could be conveyed by any means in regard to which testimony is given, no crime could be committed in respect of the illicit conveyance of whiskey, and, therefore, nobody could commit such a crime. Hence, your first inquiry must be directed to the question, whether the means, the facility, the opportunity and the location, existed, so that the crime charged could be committed. When I speak of "the crime charged," I confine my attention, and you will confine your attention, so far as this case is concerned, wholly to the question of the removal of whiskey through the hose and the pipe under ground across the yard, in the manner before named.

If you are satisfied, from the evidence, that the means, facilities, and opportunities existed for the commission of the crime, the next question is, whether the crime was committed, and, if it was, whether these defendants were concerned in it.

In regard to the question whether a defendant was concerned in a crime, it is always an important inquiry, and it is so in this case, whether there was a motive or an interest on the part of the defendant to commit the crime, and whether he had the opportunity to commit it. The interest of these defendants in this distillery, as furnishing a motive to them to remove whiskey from it illicitly, is, therefore, to be taken into consideration by you, as you shall, from the evidence, believe that interets to be.

(Here the Judge commented upon the evidence of the witnesses, twelve in number, who had been in different ways connected with the working of the distillery, and then proceeded as follows :)

This testimony is attacked on the part of the defence. The defence has consisted almost entirely of evidence in regard to former affidavits and statements made by more or less in number of these twelve witnesses. Some of

the witnesses have been attacked with great vehemence with regard to their former affidavits and statements. There are some of them who are not attacked specifically, bnt only generally. These twelve witnesses were undoubtedly, to a greater or less extent, accomplices in this removal of whiskey in this way, if you shall believe that it was so removed. The evidence of accomplices is always to be closely scrutinized by a jury. It is to be looked into closely and examined carefully. A jury is always told that it is never safe to convict upon the uncorroborated evidence of a single accomplice. That is a correct and safe rule. But the rule loses its force very much when the number of witnesses is very large and they all testify to the same state of facts, under circumstances where the jury can see that they must have had an opportunity for observing what they testify to, and particularly when some of the material circumstances in the case are corroborated by the unimpeachable testimony of persons not concerned as accomplices. In this case, the instruction which I am desired by the defence to give is not correct—namely, that the testimony of these twelve persons, who appear to be accomplices, is unworthy of belief unless it is corroborated. But the jury should scrutinize such testimony carefully, and should reject such of it as they do not believe to be entirely founded upon the truth of the facts in the case. Former statements and affidavits made by any of these witnesses, to the contrary of what they have testified here on the stand, are to be looked at by the jury solely in this point of view—"What is the truth?" If, as between the former statements and the present testimony, the jury believe, upon the whole, that the one or the other is the truth, they are to act accordingly. If they believe that the former testimony was the truth, then they are not to believe the present testimony, if the two conflict. But if, as between the two, upon the whole case, they believe that the former statement or testimony was not

true, and that the present testimony is true, then they are to believe the present testimony. It is in that point of view alone—for the purpose of arriving at what is true, that the jury are to take into consideration the former statements and affidavits; and if, in regard to any witness, they find, upon weighing the former statement or affidavit against the present testimony, that the present testimony is true, then, having arrived at that conclusion, they are to throw out entirely the former statement and the former affidavit. Because the two contradict each other, it does not follow that the jury are to reject both of them. The sole object of putting in a former statement or a former affidavit is to arrive at the truth; and when the jury arrive at what they believe to be the truth on a given point, on which there is a contradiction of that kind, they are to act upon such truth. I make this remark because I am asked by the defence to charge you that the testimony of witnesses who have given testimony on the same matter should be rejected, if it is contradictory, in material matters, to itself. That is not true, either in regard to contradictions in the testimony given by a witness here on the stand, or in regard to contradictions between his testimony and a former statement made by him. You are to weigh the fact of contradiction; and, in thus weighing the testimony of a given witness, you are to take into consideration contradictions of all kinds made by him. After such investigation, after you have ascertained from the evidence what is the truth, if you find that any witness has wilfully and deliberately told a falsehood here upon the stand as to a material fact, you have the right to believe that he is not worthy of credit in any particular.

Having thus gone over the evidence, and the principles of law which govern its application, I shall call your attention to the statute on which the indictment is founded; and you will, from the review which I have made of the evidence, be the better able to apply it to

the statute. The two classes of offences counted on in the indictment are embraced in the 45th section of the Act of July 13th, 1866. The one offence is, removing distilled spirits from the place where the same are distilled, otherwise than into a bonded warehouse, as provided by law. The other offence is, aiding and abetting in the removal of distilled spirits from a distillery otherwise than to a bonded warehouse, as provided by law. The former provision uses the expression, removing "any distilled spirits from the place where the same are distilled," while the latter provision uses the expression, removing "distilled spirits from any distillery." So far as this case is concerned, the place where spirits are distilled is the distillery, not the tail of the worm, or the still itself, but the distillery premises; and, therefore, the removal which, for the purposes of this case, is made a crime by the statute, is the removal of spirits from the distillery building otherwise than into a bonded warehouse.

A distinction is made by the statute between the two classes of offences—removing, and aiding or abetting in removing. The punishment of them is different. The removal of spirits is made a higher offence, if we may judge from the punishment bestowed upon it, than the aiding or abetting in their removal; and it is true, as I am requested to charge by the defence, that you cannot find the defendants guilty as principals, and, also, as aiders and abettors in the same offence. You cannot find them guilty of removing spirits, and of aiding and abetting in the removal of spirits, at the same instant. That is, if Blaisdell goes to the cistern-room, opens the door with a key, and attaches the hose, and the tap is opened and the spirits run through to the rectifying house, he cannot, for that act, be convicted both of removing the spirits and of aiding and abetting in their removal. He cannot, for the one act, be convicted of the two offences, so as to accumulate upon him, for that one act, the two

punishments; and so, with regard to any other one of the defendants. Therefore, if, under the instructions which I shall give to you in a moment, you shall find that, on a particular occasion, Blaisdell, or Eckel, or McClaren, was guilty, by a certain act done on a certain night, of removing spirits, he is not guilty of aiding and abetting also, by that same act, although he may be found guilty of aiding and abetting by a different act on the same or some other night. As I stated before, there is one count for removal during the first run, and two counts for removal during the second run. There are but three removals of spirits counted on in the indictment. You can find each of the defendants guilty of but one removal of spirits during the first run; and, if you find that each of the defendants, on any occasion during the first run, was guilty of the removal of spirits, with intent to defraud the United States, then they are liable to conviction on the first count, and you will find such of them guilty on the first count as you find to have been engaged in such removal. But they cannot be convicted, any one of them, of more than one removal during the first run. In like manner, each of them may be convicted of two removals during the second run; and each of them may be convicted of two aidings and abettings in removal during the first run, and of one aiding and abetting in removal during the second run, provided always that you bear in mind what I just now stated to you, that you cannot convict them, for the same specific act on the same night, of a removal, and also of aiding and abetting in a removal.

I will now proceed to instruct you as to what is, under this statute, a removal of spirits, and what is an aiding in the removal of spirits, and what is an abetting in the removal of spirits. If you shall believe, from the evidence, that any one of these defendants, who had an interest in this establishment, and in the profits of working it, directed, prescribed, ordered, or set on foot the

removal of spirits in the way described, then he may be convicted of such removal, even though he was not personally present; and, if any one of them, whether he had a personal interest in the spirits or not, was personally concerned in handling, on any occasion, the means of removing the spirits—if he opened the door with the key, or if he handled the hose, or if he screwed on the hose, and that was followed by the transportation of spirits by those means to the rectifying house, then he is guilty of removing spirits, and not merely of aiding and abetting in their removal. Any other help or assistance, other than what I have stated to be a removal, is an aiding in a removal; and giving any encouragement or instigation to commit a removal, other than what I have defined to be a removal, or an aiding in a removal, is an abetting in a removal.

The first count being for a removal during the first run, and the fifth and sixth counts being each of them for a separate removal during the second run, if, under the instructions which I have given you in regard to what is a removal, you find that each of the defendants was engaged in removing whiskey once during the first run, you are authorized to convict each of them under the first count. If you find that each of them was engaged twice in removing whiskey during the second run, you are authorized to convict each of them of two removals during the second run, one under the fifth count and one under the sixth count. If you find that each of them committed the offence of removal but once during the second run, they can be convicted on only one of the counts for a removal during the second run, and must be acquitted on the other. So, also, you may find any one or two of them, and not all, guilty of a removal on the one occasion during the first run, or on the two occasions, or either one of the two occasions, during the second run. For instance, you may find Blaisdell and Eckel guilty on any count, and McClaren not guilty on the same count.

It is not necessary that the defendants should be jointly guilty of any one act. The indictment is not for a conspiracy. Although they are indicted together, the offences are distributive, and each defendant is responsible before you only for his own participation and his own act. Thus, you may convict Blaisdell alone, or Blaisdell and Eckel, of removing spirits on the first count, and acquit McClaren on that count, upon the evidence, as you shall find it to be; and the same view applies to the counts respecting aiding and abetting. On that subject I would call your attention again to the fact, that McClaren did not make his appearance at the establishment, so far as the evidence shows, until about a week before the first seizure; and my recollection of the testimony to connect McClaren with anything done there during the last week of the first run, is, that it is of a very slight character, and perhaps not sufficient to warrant a jury in finding him guilty of anything charged in the indictment during the first run.

You will also bear in mind this principle, which applies to all criminal cases—that if you have any reasonable doubt, founded upon the evidence, of the guilt of any one of the defendants, under any one of the counts, you will give to him the benefit of that doubt. You will not decide the question upon a preponderance of evidence as being more against him than for him; but if you have a reasonable doubt, founded upon the testimony—not a caprice, or a notion, or a theory—you will give to the defendant in regard to whom it exists, in reference to any specific offence or offences charged in any of the counts, the benefit of that doubt, and the benefit of an acquittal.

I now commit this important case to your consideration. You will not convict any one of these defendants because others as guilty or more guilty have not been prosecuted and convicted, nor will you acquit them because others as guilty or more guilty have escaped punishment. These are considerations with which the

Court and the jury have nothing to do. Nor have you anything to do with the consequences which may follow a conviction. The law has prescribed what those consequences shall be, and has confided to the jury solely the determination of the question, under the charge of the Court, whether the defendants are or are not guilty of the offences which the law has defined. The punishment that shall be inflicted, within the discretion which the law has confided to the Court, and the exercise of the pardoning power afterwards by the Executive department of the Government, are questions with which the jury, when they retire to consider, under their oaths, the question of the guilt or innocence of the defendants, have nothing to do.

I doubt not, gentlemen, from the patient attention you have given to this case, from the thorough manner in which it has been tried, by the examination and cross-examination of the witnesses on both sides, and by the summing up of the counsel on both sides, and from the review which the Court has given to you, of the voluminous testimony, that your minds are fully impressed with all the points of the case, and that you will do justice between the United States of America and these defendants.

The jury rendered a verdict of guilty against the defendant Blaisdell, on all the counts except the third and the seventh; a verdict of guilty against the defendant Eckel, on all the counts except the third and the seventh; and a verdict against the defendant McClaren, on the eighth count, with a recommendation to mercy.

The District Attorney, S. G. Courtney, having, on the third day after the trial, moved for the judgment of the Court on the defendants, Mr. Knox, of counsel for the defendants, asked for a delay of judgment, on the ground that, in consideration of disclosures which the defendants had made to the Govern-

ment, in regard to frauds on the revenue, in connection with distilled spirits, the pledge of the Government had been given to them that they should not be prosecuted for the offences of which they had been found guilty. The District Attorney opposed any delay.

BLATCHFORD, J. I have listened to every thing that has been said on both sides in regard to this matter. Very much of what has been said has no relevancy whatever to the question before the Court, but has reference to matters in regard to which there is evidently a very great degree of feeling between the respective counsel, and with which this Court has nothing to do.

The considerations which have been presented by the counsel for the defence, I accept, upon his statement, as fully, to all intents and purposes, as they could be presented by the most solemn affidavits. I will assume that the President of the United States and the Attorney-General, through parties with whom they have communicated, have promised protection, or pardon, to these defendants, to the fullest extent. But that is a matter with which this Court has nothing whatever to do. Any promises or pledges of the Government in that regard, if made, will undoubtedly be redeemed. It is for the Executive Department of the Government to exercise the power of pardon, either independently, or in consequence of previous assurances to that effect. If the Government, in its wisdom, acting through the President and the Attorney-General, thought that this case was a case which ought not to be prosecuted, because of those assurances, they had the power, at any time, to prevent its prosecution, by directing the District Attorney not to prosecute it. This Court can only have communication with the Executive authorities of the Government, through the District Attorney, as the recognized officer of the Government. When there is no District Attorney in commission, the Govern-

ment cannot prosecute in this Court. It is only through the presentation to the Court of the commission of the District Attorney, so that the Court may know who is the proper legal officer to represent the United States, that the Court can have any communication with the Executive Department of the Government. In this case, in particular, the Court knows, officially, that for a time the prosecution of this case was suspended, on the motion of the District Attorney, who stated that he acted by direction of the Attorney-General, and that afterwards the District Attorney moved that the case proceed, stating that the inhibition upon its prosecution was withdrawn, and that he was directed to prosecute the case. The Court, therefore, can know nothing of the action of the Executive Department of the Government, except through the officer who is recognized by the statute as the proper officer to communicate with the Court, on the part of the United States, and to direct the prosecution of the case. If, in the prosecution of the case, the District Attorney has used, as evidence, testimony that has been produced in violation of any previous pledge, or testimony that has been procured through disclosures made by these defendants in such a manner as to entitle them to the exercise of the Executive clemency, the promise is one which must be redeemed by the Executive Department alone, and in which this Court has no part whatever. This Court, in the exercise of its judicial functions, can only know that an indictment was found by a grand jury, which has been fully, thoroughly, and fairly investigated by an impartial petit jury, resulting in a conviction; and it is the duty of the Court to impose the sentence of the law according to the facts, as developed on the trial. One of the great features of our system of government, derived from our English ancestors, is the entire separation of the functions of the Judiciary from the functions of the Executive—not merely an

independent Judiciary, but the separation of the functions of the two departments of the Government. The administration of the judicial functions of the Government, under the Constitution of the United States, is entirely separate from the administration of the Executive functions of the Government; and to call upon a Court of the United States to redeem, or perform, or fulfil, in any way, in this case, pledges, even the most extensive, the most absolute, and the most thoroughly proved, on the part of the Executive Department of the Government, is to depart entirely from the true theory and the wise practice of our system of Government, and to violate the fundamental principles of the Constitution of the United States. Pledges of the character of those spoken of here, and which it is alleged have been made in this case, are sometimes made by the Government, and, whenever they are made, the Executive officers of the United States undoubtedly redeem them; and they will redeem such as may have been made in this case, if it be proper to do so. But this Court has no concern with any such stipulations.

I, therefore, see no reason why the Court should not proceed to pass the sentence which follows from this conviction, leaving the responsibilities, which will then fall upon the Executive departments of the Government, to be discharged by those departments, according to their own judgment.

Blaisdell and Eckel were each sentenced to three years' imprisonment in the State prison, under the first count in the indictment. Sentences were suspended upon the other counts, until the sentences pronounced should be fully executed. McClaren was sentenced to four months' imprisonment.

JANUARY, 1869.

IN THE MATTER OF EDWARD BIGELOW, DAVID BIGELOW, AND NATHAN KELLOGG, BANKRUPTS.

JOINT AND SEVERAL DEBT.—PARTNERSHIP ASSETS AND INDIVIDUAL ASSETS.—COUNSEL FEES FOR DRAWING SCHEDULES.

Where members of a firm had been adjudged bankrupt, and a creditor proved a claim against them separately and not against the firm, the foundation of the claim being a bond made by the bankrupts, "composing the firm of E. & D. Bigelow & Co.," in which they bound themselves, "jointly and severally," the assets of the partnership not being sufficient to pay the partnership debts, but the assets of one of the partners being sufficient to pay all his separate debts in full:

Held, That the creditor was entitled to dividends upon his debt out of the several assets of the individual bankrupts.

Counsel fees for attending on behalf of a bankrupt and opposing proceedings in involuntary bankruptcy, and for drawing inventories and schedules required to be made and filed under the order of adjudication of bankruptcy, are not proper charges against the estate in the hands of the assignee.

THE firm of E. & D. Bigelow & Co., composed of the bankrupts above named, and its individual members, were adjudged bankrupts, in involuntary proceedings. Debts were proven to the following amounts:

Against the firm	$209,748 24
Against Edward Bigelow individually	55,395 67
Against David Bigelow individually	13,961 83
Against Nathan Kellogg individually	45,715 78

The assets were as follows:

Assets of the firm	$22,787 07
Assets of Edward Bigelow	14,131 03
Assets of David Bigelow	32,346 75
Assets of Nathan Kellogg	22,709 93

In the Matter of Edward Bigelow, and others, Bankrupts.

John Bigelow filed proof of a claim against the several bankrupts for $5,495.64, founded upon a bond executed by "Edward Bigelow, David Bigelow, and Nathan Kellogg, and composing the firm of E. & D. Bigelow & Co.," by which the obligors bound themselves "jointly and severally," and their "heirs, executors, and administrators, and each of them."

Other creditors objected to this claim, as against the separate estates of the bankrupts, alleging that the debt was originally a partnership debt, and should receive dividends only out of partnership assets. Thereupon, the Court referred it to the register, to take proofs and report them to the Court, with his opinion. The register reported, that the evidence sustained the position that the debt was originally a partnership debt. But he also held, that, under the 36th section of the bankruptcy Act, the right of the creditor to maintain his claim against all or either of the obligors was not affected, and that the creditor could sustain his proof of debt against the separate partners. He cited the cases of *Mead* v. *The National Bank of Fayetteville*, (6 *Blatchf. C. C. R.*, 180,) and *In re Farnum*, (6 *Law Repr.*, 21.)

BLATCHFORD, J. I concur with the register, that the creditor, John Bigelow, is, under his proof of debt, entitled to dividends out of the several assets of the individual bankrupts.

The register also submitted to the Court a bill, which had been presented to the assignee by counsel for the bankrupts, for services in attending on the return of the order to show cause, and successfully resisting two of the grounds on which the adjudication of bankruptcy was sought, and also for services in preparing the inventories and schedules required, under the order of adjudication of bankruptcy, to be prepared and filed by the bankrupts.

BLATCHFORD, J. I do not think the bill is a charge against the estate of the bankrupts in the hands of the assignee.

FEBRUARY, 1869.

THE BARK OLBERS.

BILL OF LADING.—LEAKAGE OF CASK.—BURDEN OF PROOF.—PLEADING.

Where an answer contained allegations which were inconsistent, but it had not been excepted to, and the case went to trial:

Held, That the Court must take that allegation, which operated most strongly against the claimants, to be the one really made.

The averment, in a bill of lading, that a cask was "in good order and well conditioned," extends only to its apparent external condition, excluding any implication as to its intrinsic soundness and sufficiency.

Where a cask of wine was delivered empty, the wine having leaked out through a hole, which, on the evidence, the Court found to have been a latent defect in the cask, the bill of lading containing the clause "not accountable for leakage:"

Held, that a loss by such defect afforded an excuse for the non-performance of the bill of lading, and the burden was thrown upon the consignee to show that the loss might still have been avoided by the exercise of reasonable skill, diligence, and attention on the part of the carrier;

That, as such evidence was not given, the vessel was not liable for the loss.

THIS was a libel to recover the sum of $489, as the value of the wine contained in a cask, shipped on the bark Olbers, at Rotterdam, on the 3d of November, 1865, by C. Hemmann & Co., consigned to the libellants, Jacob Wolf and Alexander Wolf, at New York. The shipment was made under a bill of lading signed by the master of the vessel. The bill of lading covered twenty-six casks in all. It contained a statement that the property was shipped "in good order and well condi-

tioned," and contracted for the delivery of it "in the like good order and well conditioned," "all and every dangers and accidents of the seas and navigation, of whatsoever nature or kind, excepted." Upon the face of the bill of lading, (which was a printed blank, in English, filled in with written words,) the following words were separately impressed by a stamp: "Not accountable for leakage, breakage, rust, or corruption." The libel alleged, that the master failed to deliver to the libellants the wine in one of the casks, although no danger, or accident of the seas or navigation, prevented, and that, through the negligence of those in charge of the vessel, while the wine was in such cask, and such cask was in the keeping of the vessel and her master, a hole was pierced in the head of the cask, near the chime thereof, with an instrument unknown to the libellants, and all of the wine was taken out of the cask, and no part of it was ever delivered to the libellants.

The answer admitted, that the cask was delivered to the master of the vessel in apparent good order, as to its external condition, and set up that, by the bill of lading, the vessel was not to be accountable for any loss arising from leakage, breakage, rust or corruption; that the cask was delivered to the libellants, at New York, to all external appearance, in the same condition in which it was received by the vessel; that any loss or abstraction of its contents which occurred, happened before it came on board of the vessel or after its delivery therefrom; that, during the voyage, the vessel met with great storms; that, if the contents of the cask were lost, the loss was caused by the perils of the sea, and by reason of the cask being defective and imperfect and not sufficiently strong to withstand the voyage; and that, by usage and custom in regard to such merchandise, the vessel was not accountable for leakage under such circumstances.

For libellants, *C. Goepp.*

For claimants, *J. K. Hill.*

BLATCHFORD, J. It is impossible not to remark the wholly and recklessly inconsistent statements in this answer, and which, moreover, are sworn to. There is, first, a statement that the loss or abstraction of the contents of the cask, if any there were, did not take place on board of the vessel; and then a statement that the loss, if any, was caused by the perils of the sea, and the inability of the cask to withstand the voyage, and consequently during the voyage and while the cask was on board of the vessel. It is unnecessary to say that both of these averments cannot be true. The answer not having been excepted to for these inconsistencies, this Court must take that allegation which operates most strongly against the claimants, to be the one really made, namely, the allegation that the loss took place while the cask was on board of the vessel, and from an excusable cause.

The proof, in this respect, corresponds with the allegations of both the libel and the answer, and shows that the leakage of the wine from the cask took place while the cask and its contents were on board of the vessel. Such loss being shown, the burden falls upon the claimants to show that it was occasioned by one of the perils or causes from which they were exempted by the bill of lading, or by the general rules of law. (*Clark* v. *Barnwell*, 12 *Howard*, 272, 280.) There is no satisfactory evidence that the loss of the wine was occasioned by any danger or accident of the seas or of navigation.

The only other exception in the bill of lading, on which the claimants can rely to shield the vessel from responsibility, is the provision, that the vessel shall not be accountable for leakage. In this connection, the

answer avers that the cask was defective and imperfect. The averment in the bill of lading, that the property was "in good order and well conditioned," so far as it is applicable to the cask, extends only to the apparent external condition of the cask, excluding any implication as to its intrinsic soundness and sufficiency. (*Clark* v. *Barnwell*, 12 *Howard*, 272, 283; *The Columbo*, 3 *Blatchf. C. C. R.*, 521.) The claimants are at liberty, therefore, notwithstanding the bill of lading, to show the defectiveness of the cask. It is shown, by the evidence, that the cask was in apparent good order when it was put on board and did not then leak. When the cask was brought to light, on breaking out bulk at New York, and before it was taken out of the vessel, it was found to be substantially empty, and marks were found of the wine which had leaked out. The leakage had evidently taken place through a hole which was found in one of the two heads of the cask. The hole was on the line of the joint between two of the pieces of wood which formed the head. There is much conflicting testimony as to what was the size and character of this hole, when it was first seen after the arrival of the vessel at New York. Some of the witnesses for the claimants describe it as a round hole, and as being no larger than the head of a pin, or the point of a pencil, while witnesses for the libellants describe it as a hole whose cross-section was a square, or a parallelogram, and such a hole as would be made by a nail. The theory, on the part of the claimants, is, that the hole was made by the working out of a plug, which had been inserted into what was originally a hole made by a worm in the wood of the cask. The testimony of the master and that of the first mate of the vessel is, that the wine which leaked out escaped through that hole. In view of this fact, and of the character of the hole, in any view that can be taken, I do not think that the exemption of the vessel from responsibility for leakage, under the provision to that

effect in the bill of lading, necessarily extends to leakage through a hole of this description; but that, when such a hole is shown to exist, it is incumbent on the vessel to show that the hole was caused by a defect in the cask. This the claimants have undertaken to do, and I think the evidence satisfactorily shows, that a plug had been put into a hole, and that a longitudinal piece of that plug had become broken away from the rest of the plug and worked out, the piece so broken away being coincident, to some extent, in its outer surface, with the inner surface of the original hole. This made an orifice, through which the wine escaped. This plugged hole was a latent defect in the cask. As the evidence leads to the inference that the loss of the wine was caused by this defect in the cask, and that such defect existed before the cask was put on board, and as, according to the general rules of law, a loss by such defect affords an excuse for the non-performance of the contract, the burden is thrown on the libellants to show that the leakage and loss might still have been avoided by the exercise of reasonable skill, diligence and attention on the part of the carrier. It was, therefore, open to the libellants to show improper stowage of the cask, sufficient to cause the development of the defect, or to show that the ordinary working of the ship and cargo, as an incident of navigation, would not have caused the breaking out of the plug. (*Clark* v. *Barnwell*, 12 *Howard*, 280, 283, 284.) This they have not shown, and the libel must, therefore, be dismissed, with costs.

FEBRUARY, 1869.

IN THE MATTER OF ADOLPH LOUIS & HENRY ROSENHAM, BANKRUPTS.

PREFERENCE BY BANKRUPT WHILE INSOLVENT.—DISCHARGE.

Where a firm was carrying on business in different places in Ohio and Tennessee, and their paper went to protest about April 1st, 1867, and about the same time some of their establishments were seized by the Government of the United States for alleged violations of the Internal Revenue law, and within a short time thereafter they transferred to seven different creditors four stocks of goods and their real estate, towards payment of the debts due by them to such creditors:

Held, That, on the facts, the bankrupts were insolvent when such transfers were made;

That such transfers of goods were giving fraudulent preferences, contrary to the provisions of the 39th section of the bankruptcy Act, and that discharges must be refused to the bankrupts.

BLATCHFORD, J. The first nine specifications filed in opposition to the discharge of the bankrupts are, that the bankrupts, early in April, 1867, at Cincinnati, Ohio, while insolvent, transferred to various creditors of theirs, seven in number, real estate of theirs in Kentucky, Iowa and Texas, two stocks of goods in Memphis, Tennessee, a stock of goods at Nashville, Tennessee, and a stock of goods at Bolivar, Tennessee, for the purpose of preferring such creditors and of preventing such property from coming to the hands of an assignee in bankruptcy; that the transfers of the stocks of goods were made in a lump to each creditor, without any inventories being made; and that such transfers were fraudulent and void under the bankruptcy Act.

The paper of the bankrupts first went to protest about the 1st of April, 1867. They were then in fact insolvent; but, professing to believe that they were not, they com-

menced immediately, and continued during April and May, 1867, to turn out their property in payment of debts due to certain of their creditors, to the exclusion of others. Their indebtedness on the 1st of April, 1867, was about $500,000. By the 1st of June, 1867, according to the evidence, they had in that way paid off from $300,000 to $400,000 of such indebtedness. When their paper so went to protest, they were engaged in business as general merchants, as copartners, under the name of A. Louis & Co., dealing in wines, liquors, dry goods, and boots and shoes, with their headquarters at Cincinnati, Ohio, and branches at Memphis, Tennessee, Nashville, Tennessee, and Bolivar, Tennessee. Their assets consisted of merchandise, real estate, bank stocks, insurance stocks, book accounts and bills receivable. They had two stocks of goods at Memphis, one at Nashville and one at Bolivar. Their business at Cincinnati was manufacturing and rectifying spirits and dealing in wines and liquors. Their stock of whiskey at Cincinnati was seized by the United States about the 1st of April, 1867, with their manufacturing and rectifying establishment there, for alleged infractions of the Internal Revenue laws. The property remained under seizure till the latter part of May, 1867. The effect of the going to protest of their paper, and of the simultaneous seizure of their property at Cincinnati, seems to have been to break up their business everywhere, for, within a week or so thereafter, they turned out to creditors the four stocks of goods referred to, and their real estate in Kentucky, Iowa and Texas. One of the stocks of goods at Memphis was transferred towards payment of a debt of $100,000, and the other towards payment of a debt of $60,000. The stock of goods at Nashville was turned out towards payment of a debt of about $25,000, and the stock of goods at Bolivar towards payment of a debt of about $28,000. The property seized by the Government was turned over, about the 23d of May, 1867, on a compromise made with

the Government, to a person who paid to the Government, on behalf of the bankrupts, $15,000, and became endorser on two notes of theirs, each for $5,000, given to the United States, payable in one and two years, respectively. It is not quite clear whether other property of the bankrupts was turned out as security to the same person. When they suspended payment, they made out no balance sheet. They carried on no business at Cincinnati after their suspension, but they paid many of their creditors with the proceeds of collections made from parties who owed them, and out of the other assets before-mentioned. Their petition in bankruptcy was filed February 29th, 1868. It sets forth debts due by the firm composed of the bankrupts, amounting to nearly $90,000, and eighteen debts due to sixteen creditors in Cincinnati and two in New York city, the amounts of all of which eighteen are put down as unknown. Among these eighteen are the creditors to whom the four stocks of goods and the real estate before-mentioned were transferred. All of the debts due to the eighteen creditors are either for notes of A. Louis & Co., endorsed and paid by such creditors, or for money loaned to A. Louis & Co. by such creditors. There are no copartnership assets set out in the petition, except about $85,000 of debts due to the firm on open account, from creditors, nearly three hundred in number, scattered all over the United States, and a lease of real estate in Cincinnati, valued at $30,000 and mortgaged for $29,500. The individual debts of the bankrupt Louis are put down at a little over $2,000, and his individual assets at $1,000 worth of household furniture, mortgaged for $800. The individual debts of the bankrupt Rosenham are put down at $3,400, and one debt, amount unknown, due to a firm in New York, and his individual assets at $150 worth of wearing apparel.

On the foregoing facts, I must hold, not only that the bankrupts were insolvent on and after the 1st of April, 1867, but that they had good grounds for believing them-

selves insolvent, and that they acted on such belief in making the preferences they did among their creditors. After the 1st of April, 1867, they were not able to pay all their debts in the usual and ordinary course of business, as persons carrying on trade usually do, and their business was broken up. All this they knew. This constituted insolvency, within the meaning of the bankruptcy Act, and they, therefore, not only had reasonable grounds for believing themselves insolvent, but, in judgment of law, they knew they were insolvent. With this knowledge, they, as one of them testifies, struggled along and paid along until the latter part of May. In doing so, they made the preferences referred to, intending to pay the favored creditors, whether the others should receive anything or not. This was a giving of fraudulent preferences under section 29, contrary to the provisions of the Act, being directly contrary to the provisions of section 39 of the Act. This whole subject is thoroughly discussed and disposed of by Judge Fox, of the District Court for the District of Maine, in a very full and able opinion, (*In re Gay*, 2 *Bankrupt Register*, 114,) in which I concur. The bankruptcy Act was in operation, so as to make these transactions of the bankrupts a fraud on the Act, from and after the 2d of March, 1867. (*Langley* v. *Perry*, 1 *Bankrupt Register*, 155.) The first nine specifications are, therefore, sustained, and discharges are refused.

G. & M. Sackett, for the bankrupts.

H. H. Rice, for the opposing creditors.

Eastern District of New York.

FEBRUARY, 1869.

THE UNITED STATES *vs.* MORITZ ROSSVALLY.

COUNTERFEITING NATIONAL CURRENCY.—CONSTRUCTION OF STATUTE.

Where the accused was convicted, under an indictment charging him with aiding and assisting in the making of a plate to be used in printing counterfeit national currency bank notes, and it appeared that the 11th section of the Act, under which he was indicted, did not in terms speak of plates for printing national currency, but that the 13th section of the Act, (13 *U. S. Stat., p.* 218,) provided "That the words 'obligation or other security of the United States,' used in this Act, shall be held to include * * * national currency;" but the phrase "obligation or other security of the United States" nowhere appeared in the Act;

Held, That the 13th section referred to the words used separately, and not as a phrase, and that the quotation marks must be disregarded;

That, inasmuch as the 11th section of the Act used the word "obligation," that word must be held to include national currency, and the accused was rightly convicted:

THE accused, in this case, was convicted, under an indictment under the 11th section of the Act of June 30th, 1864, (13 *U. S. Stat. at Large, p.* 218,) of aiding and assisting in the making of a counterfeit plate from which counterfeit national currency bank notes could be printed. The 13th section of the Act provides, "That the words 'obligation or other security of the United States,' used in this Act, shall be held to include and mean all bonds, coupons, national currency, &c., &c." A motion was made in arrest of judgment, on the ground that the phrase "obligation or other security of the United States" did not occur in the 11th section of the Act, nor did that section otherwise make it an offence to counterfeit national bank notes.

BENEDICT, J. This case comes before the Court upon a motion in arrest of judgment. The prisoner has been convicted under an indictment charging him with aiding and assisting in the making, preparing and engraving of a certain plate, in the likeness and similitude of certain parts of the plate from which are printed certain parts of a United States national currency note particularly described, and also with having in his control, custody and possession, a certain metallic plate, made, prepared and engraved in the likeness and similitude of certain parts of the plates from which are and have been printed, and which were designed for the printing of, certain parts of the United States national currency notes, particularly described, with intent to use the same in counterfeiting such notes. He now moves in arrest of judgment, upon the ground that the Act of June 30th, 1864, under which the indictment is found, creates no such offence as is charged, inasmuch as the words of the 11th section of the Act, which is the section relied upon by the Government, only relate to the bonds provided for in the Act, and do not include the national currency, and that the provision of the 13th section of the same Act, which declares "that the words 'obligation or other security of the United States,' used in this Act, shall be held to include and mean all bonds, coupons, national currency * * * * which have been or shall be issued under any Act of Congress," has no effect upon the words of the 11th section, for the reason that the phrase "obligation or other security of the United States" nowhere occurs in that section. The point is untenable. It is true that the phrase "obligation or other security of the United States" does not occur in the 11th section of the Act in question, but it is also true that the phrase is nowhere used in the Act. If, then, the 13th section is to be considered as confined in its effect to the defining of the phrase "obligation or other security of the

United States," which appears there to be quoted as a phrase, the whole 13th section is without effect, and meaningless. No proper rule of construction requires this result. The Act declares that the words, not the phrase, "obligation or other security of the United States," used in this Act, shall be held to include national currency, and although the words appear inclosed in quotation marks, as a phrase, the fact, that no such phrase is used, indicates clearly that the section refers to the words when used separately, and not as a phrase. This would be the reading of the section, if the quotation marks were omitted; and these marks, if not placed as they are by a proof error, cannot be considered as sufficient to make useless so significant a section, which, without them, has a clear meaning and important effect. They must, accordingly, be disregarded. Under this construction, then, of the 13th section, it is manifest that the 11th section creates the offence here charged, for it uses the word "obligation," which, by the 13th section, is declared to include national currency. This is the only point which has been taken on behalf of the prisoner, and that being held against him, the motion must be denied.

THE STEAMER EMILY B. SOUDER.

LIEN ON SHIP FOR ADVANCES.—CREDIT.—PAYMENT.—GOLD CONTRACT.

Where a vessel put into the port of Maranham, in distress, being foreign to that port, her master being without means to pay for the repairs, and her owners being without credit, and thereupon the libellants advanced to the master, towards the payment of the expenses of the vessel, $4,387.70, on the request of the master, and on his promise that it should be repaid in gold, in the United

States, for which sum the master gave a draft on his owners, payable in gold, which draft was not taken in payment:

Held, That the libellants had a lien upon the vessel for the amount of the advances;

That, in conformity with the decision in *Bronson* v. *Rodes*, (7 *Wallace*, 229,) a decree must be entered in favor of the libellants, against the vessel, for $4,387.70, in gold, with interest and costs.

BENEDICT, J. This is an action brought to enforce a lien alleged to exist upon the American steamer "Emily B. Souder," for the amount of certain advances made to that vessel by the libellants, Pakenham, Beatty & Co., in the port of Maranham, Brazil, into which port she put in distress, in June, 1865.

The amount and correctness of the advances are not seriously disputed by the claimants.

The defence relied upon is, that the advance was not made upon the credit of the vessel, but upon the credit of the owners, and that the libellants accepted a draft drawn by the master upon his owners as payment therefor.

The proofs fail to sustain this defence. On the contrary, the weight of the evidence is, that the advance was made upon the credit of the vessel, and that the draft was not accepted as payment. It also appears in evidence, that the vessel was a vessel foreign to the port of Maranham, and that she was compelled to put into that port, in distress, by reason of an accident to her screw; that her master was without means sufficient to pay for the needed repairs, and the owners without any credit there; that the amount of the necessary expenditures of the vessel, to enable her to proceed on her voyage, was the sum of $5,966.65, in gold, towards defraying which the libellants advanced, upon the request of the master, and upon his agreement that it should be repaid in gold, the sum of $4,387.70, for which sum the master gave the libellants his draft upon his owners, payable in gold; but such draft was not given

in payment of the advances, nor received in extinguishment of the original debt, and was never paid.

Upon such a state of facts, according to the maritime law, a lien was created upon the vessel, in favor of the libellants, which they are entitled to enforce by this action.

The remaining question is as to the amount of the lien, and the kind of currency in which it is payable.

As before stated, it appears that the parties contracted the debt in gold and the draft was made payable in gold, in New York. The case then appears to be clearly within the principle of the decision of the Supreme Court of the United States, in the late case of *Bronson* vs. *Rodes*, (7 *Wall.* 229.) That case decides that there is now, and has always been, notwithstanding the passage of the currency or legal tender Acts, a lawful gold and silver coined money of the United States, in use as money and a legal tender, and that an express contract to pay coin can only be satisfied by the payment of coin. In the case before me the advances were, by the agreement of the parties, to be repaid in gold in the United States. The law gave to the libellants a lien upon the vessel, to secure this advance, and according to the decision of the Supreme Court that obligation can be satisfied, only by a payment in gold. In accordance with these views a decree must be entered in favor of the libellants against the steamer in question, for the sum of $4,387.70 in gold, with interest.

The libellants are also entitled to recover their costs.

For libellants, *C. Van Santvoord.*

For claimants, *Beebe, Donohue & Cooke.*

In the Matter of Robert Feinberg, and others, Bankrupts.

Southern District of New York,

MARCH, 1869.

IN THE MATTER OF ROBERT FEINBERG, MARTIN STEENBOCK AND GUSTAV PESSELS, BANKRUPTS.

WITNESS.—COUNSEL.—PARTY.

Where, on a petition filed by an assignee in bankruptcy against one W., an injunction had been issued out of this Court against him, restraining him from parting with any property that had come into his possession from the bankrupts during the four months preceding the adjudication of bankruptcy, and thereafter, on a summons issued at the instance of opposing creditors in the bankruptcy proceedings, W. attended as a witness before the Register, and was sworn and claimed the right to be attended by counsel on such examination, and the bankrupts objected to his being examined at all, on the ground that W. had been made a party to the bankruptcy proceedings:

Held, That the objection taken by the bankrupts to the examination was not well taken.

That, under the decision in *Fredenberg's* case, (2 *Ben. R.*, 133,) the witness was not entitled to be represented by counsel.

IN this case, a summons had been issued by the Register at the instance of opposing creditors, to Isidor Wedeles, to attend and be examined as a witness. The witness attended and was sworn, when the bankrupts' counsel objected to his being examined, on the ground that he had been made a party to the bankruptcy proceedings, by the fact that the assignee in bankruptcy had filed a petition against Wedeles and others, seeking to recover certain property from them, as being property of the bankrupts, and had obtained an injunction from this Court, restraining them from transferring any property received from the bankrupts within the four months preceding the adjudication in bankruptcy.

The witness claimed the right to be represented by counsel on his examination. This was objected to by counsel for the creditors.

The Register decided, that the objection of the bankrupts was not well taken, and that, under the decision in *Fredenberg's* case (2 *Ben. R.*, 133,) the witness was not entitled to be represented by counsel. On request, the questions were certified to the Court.

For creditors, *G. W. Wingate.*

For bankrupts, *P. J. Joachimssen.*

For witness, *S. Stern.*

BLATCHFORD, J. The Register was correct in both of his decisions.

MARCH, 1869.

THE SHIP NORWAY.

LIEN.—BUILDING CONTRACT.—JURISDICTION.

A Court of Admiralty has no jurisdiction of a suit *in rem* against a ship, to recover for work, labor and materials done and furnished towards the building of the ship, even though the law of the State gives a lien upon the ship therefor.

BLATCHFORD, J. This is a libel filed in September, 1857, by Anthony J. Allaire, since deceased, against the ship Norway, to recover the sum of $2,608.20, for materials furnished and labor performed by Mr. Allaire, as a plumber and coppersmith, between June and September, 1857, towards the building of the ship. It is

averred in the libel, that the ship is and was a domestic vessel, owned by residents of the State of New York; that such materials and labor were necessary and proper to the building and constructing of the ship, and went into the ship and became part of her, and were furnished and done on the credit of the ship; and that the amount due for them is, by the laws of the State of New York, a lien on the ship. The principal point urged in defence is, that this Court has no jurisdiction of the action.

In a suit brought by the same libellant against the ship Francis A. Palmer, for materials furnished and labor done by him, as a plumber and coppersmith, in and towards constructing such ship, decided by Mr. Justice Nelson, on appeal, in the Circuit Court for this District, in May, 1859, the ship being a domestic vessel, owned by residents of New York, it was held that the District Court had no jurisdiction of the suit. In his opinion in that case, Mr. Justice Nelson, citing the case of *The People's Ferry Co.* v. *Beers*, (20 *Howard*, 393,) decided by the Supreme Court at the December term, 1857, says: "It was there held, that the Admiralty jurisdiction did not extend to cases of liens claimed for work done or materials furnished in the construction of ships; that the contract for building was not a maritime contract, nor did it involve rights and duties appertaining to commerce and navigation, in the sense of the law giving jurisdiction t the Admiralty. This case was decided after full argument, and a careful consideration of the question, and we must regard it as settling the point of jurisdiction in the case before us. For, if the Court had no jurisdiction of the principal contract for building the vessel, and this on account of its nature and character, not being a maritime contract, it had not of the collateral and incidental contracts arising out of the construction. They must be regarded as partaking of the nature of the principal one, or, certainly, as of no higher character in this respect. It may be said, however, that

the statute of New York gives a lien to the material man and workman in this case, which distinguishes it from the case referred to. It is true, that there was no statute in the State of New Jersey, where that vessel was built, giving a lien to the builder; but that circumstance in no way influenced the judgment of the Court. The result would have been the same if a local lien had been given by the State law. The local lien attaches in no case within the Admiralty law, as heretofore expounded by the Courts of this country, except where the contract is maritime in its nature and character. This was so decided soon after the Courts recognized the local liens and enforced them in the Admiralty. It was so decided in the case of a libel by the master of a ship for his wages. The lien was denied, though given by the local law." The case referred to is that of *The Steamboat Orleans* v. *Phœbus*, (11 *Peters*, 175.) This construction of the case of *The People's Ferry Co.*, v. *Beers*, and the soundness of the principle of the decision of the Circuit Court for this District in *Allaire* v. *The Francis A. Palmer*, were affirmed by the Supreme Court, in *Roach* v. *Chapman*, (22 *Howard*, 129,) decided at the December term, 1859. That was a suit against a vessel for the price of machinery furnished to build her, and a lien was given therefor by the law of the State where she was built. Mr. Justice Grier, in delivering the opinion of the Court says: "A contract for building a ship, or supplying engines, timber or other materials for her construction, is clearly not a maritime contract. Any former dicta or decisions which seemed to favor a contrary doctrine were overruled by this Court, in the case of *The People's Ferry Co.*, v. *Beers*, (20 *How.*, 400.)" He then overrules the point that the jurisdiction can be maintained because the State law gives a lien, and cites the case of *The Steamboat Orleans* v. *Phœbus*, to show that the contract for which the State law gives the lien

must be a maritime contract, in order to be enforceable in the Admiralty.

The libel in this case must be dismissed, with costs.

John Van Vleck, for the libellants.

R. D. Benedict, for the claimants.

MARCH, 1869.

IN THE MATTER OF HENRY H. WATTS, A BANKRUPT.

Amendment of Schedules.—Opposition to Discharge.

Where, on the examination of the bankrupt, a certain lease appeared to be the property of the bankrupt, which was not mentioned in the schedules attached to the bankrupt's petition, and he thereupon applied for leave to amend the schedules in that particular:

Held, That the application for leave to amend was an *ex parte* one, which no creditor had any right to oppose;

That the allowance of such an amendment could not conclude any creditor from availing himself of any ground of opposition to the discharge which he would have had if the amendment had not been allowed.

In this case, during the examination of the bankrupt before the Register, evidence was given of a lease, of which it appeared that he was the owner, and which had not been mentioned in the schedules attached to the bankrupt's petition. The bankrupt thereupon applied to the Register, on a petition excusing the omission, for leave to amend his schedules, by inserting the lease as a part of his assets. The creditors opposed the application, on the ground that they proposed to avail themselves of the omission, as a ground of opposing the bankrupt's discharge. The Register, doubting whether the applica-

tion was, in fact, an *ex parte* application, on which he could properly pass, certified the question to the Court.

BLATCHFORD, J. Under section 26, and General Order number 7, the Register has power, under General Order number 5, to allow a petitioning bankrupt to amend his schedules, on complying with General Order number 33. The application is an *ex parte* one, of which no notice is necessary. No creditor has a right to oppose any such application, and, therefore, no issue of fact or law, within section 4, can be raised or contested in regard to it, to be decided by the Judge. If a Register improperly refuses an application to amend, the bankrupt can, under section 6, take the opinion of the Judge, on a certificate from the Register, on the question.

In this case, the allowance of the amendment cannot in any manner prejudice the right of the creditors to oppose the discharge of the bankrupt for his having omitted the matter in question from his original schedules. The order of the Register, allowing the amendment, in no manner concludes the creditor on the point, as the creditor is no party to the proceeding, so as to be estopped by the order from availing himself of any ground of opposition to a discharge which he would have had in the absence of the order. Still, if the case be a proper one for allowing the amendment in question, it is proper for the Register to allow it, in terms, without prejudice to the right of the creditor to oppose the discharge upon the ground of the omission of the matter from the original schedules.

MARCH, 1869.

THE STEAMSHIP CELLA.

COLLISION OFF LONG ISLAND.—STEAMER AND SCHOONER.—PORTING HELM.—DAMAGES BY STRANDING AFTER COLLISION.

A schooner, heading about east southeast, on her starboard tack, with the wind from the south, on a bright starlight night, discovered a steamer's lights about two points on her port bow, and kept her course till a collision between the vessels was inevitable, when her helm was put to port. The steamer discovered the two colored lights of the schooner at from one and a half to two miles' distance, half a point on her starboard bow, and her helm was at once ported. The port bow of the steamer struck the port bow of the schooner, and carried away all the rigging on that side, so that she could not be brought up into the wind, for fear of losing her masts, and she was anchored, and the next morning went ashore on Long Island:

Held, That, as the schooner did not change her course till the collision was inevitable, she was free from fault, and, no excuse having been shown by the steamer for not having avoided the schooner, the steamer must be held liable;

That the manœuvre of the steamer, in porting her helm, was faulty. Under the circumstances, she should have starboarded;

That the steamer was liable for the damages, including those consequent upon the stranding of the schooner.

BLATCHFORD, J. This is a libel filed by the owners of the schooner Nellie Bowen, to recover for the damages caused to that vessel, and her cargo, by a collision between her and the steamship Cella, which occurred about midnight, on the 3d of December, 1866, some seven miles or more to the southward of Fire Island light, on the coast of Long Island. The schooner was on a voyage from Boston, Massachusetts, to Richmond, Virginia, with a cargo of ice, fish, furniture, &c. She had her proper lights set, and a proper lookout. The wind was fresh from the south, and she was beating against the wind, and was on her starboard tack, heading about east southeast, thus lying within about six

points of the wind. She discovered the lights of the Cella, about two points on her port bow, a long distance off. The Cella was on a voyage from London to New York. The steamer came on, and, when she had approached so near to the schooner that, to the view of those on board of the schooner, a collision was inevitable, the helm of the schooner was put to port, for the purpose of luffing, but it does not appear that her sails shook at all. The port bow of the steamer struck the port bow of the schooner, about at the cathead, and the steamer, raking aft, carried away all the fore rigging and main rigging of the schooner on her port side, and did other damage, and thus rendered her perfectly helpless, with great danger that her masts, thus left without support on one side, would snap. The crew of the schooner made all proper effort to secure her masts, and to put up temporary rigging. To do this, it was necessary to keep the vessel before the wind till she could anchor with safety, for the wind kept increasing so much that it was deemed imprudent, for the safety of her masts, to bring her to anchor, which would require, in the operation, the bringing her head to the sea and the wind. Efforts were made to bring her head to the wind, but, having fallen off, at the time of the collision, she could not, in her shattered condition, be brought around, through the trough of the sea, to the wind, without danger of her masts going overboard, and they were heard to crack, in the attempts that were made. She drifted on, until, by steadying her masts, and getting down her sails, she was anchored and brought up. But she struck adrift, as the wind increased, and was brought up by a second anchor. Then temporary rigging was set up, and, after sunrise the next morning, an effort was made to get her under way, but her anchors could not be got up, and she dragged them, and struck the bottom, and was then headed on shore, and went on the beach, opposite Hempstead.

The answer admits, that the night was a clear, bright starlight one, and that the Cella saw the two colored lights of the schooner at from one and a half to two miles' distance. The only defence set up in the answer is the stereotyped one, that the schooner changed her course. There is not a particle of proof to sustain this defence. On the contrary, the testimony of the witnesses for the claimants, as well as of those for the libellants, shows that the schooner kept her course, as it was her duty to do, until just at the moment of the collision, when, to ease the impending blow, she ported her helm. This movement of the schooner, in the moment of danger, is not imputable as a fault. The pilot of the Cella (for she had a Sandy Hook pilot on board) says, that he first saw a light on the schooner half a point on the starboard bow of the Cella, and judged it to be a mile and a half or two miles off; that he then ported his wheel, and kept the light in sight till it got to bear two or three points on his port bow; that he had scarcely altered the position of the Cella, before he saw the two lights of the schooner; and that they remained in view until a second before the collision, when the green light was hid, and the red light alone remained in view. This testimony corroborates the evidence of those on board of the schooner, that she kept her course until almost the moment of collision, and then ported to luff, which would have thrown her green light out of view. So, also, the master of the Cella says, that he first saw the lights of the schooner ten minutes before the collision, when they were half a mile off, and at that time saw her green light and her red light from one and a half to two points on the port bow of the Cella, the wheel of the Cella being then hard a-port; that the green light of the schooner was hid a moment before the two vessels struck each other; that up to that time both of the lights of the schooner were in sight from the Cella; and that he saw no luffing on the part of the schooner from

the time her lights were made until the collision. It appears, by the testimony of the witnesses from the Cella, that the red light alone of the schooner was first made on the Cella, a point on the starboard bow of the Cella by the compass, and that the helm of the Cella was at once put hard a-port, but that, notwithstanding that, the bearing of the lights of the schooner kept closing in on the Cella all the time till the collision, an interval of nearly ten minutes. Perry, a seaman on the Cella, who assisted in putting her wheel to port, and who saw the two lights of the schooner just as the steamer's wheel was put to port, says that he kept his eyes on the two lights of the schooner up to the time the vessels struck, and that a very short time, not many seconds, before the contact, the schooner hid her green light. The protest of the Cella, made on the 6th of December, 1866, and signed and sworn to by the master, the first mate, the carpenter and two of the seamen of the Cella, and by her pilot, states that the schooner was steering, according to their best observation, east by south, or east southeast, and that, from the appearance of her lights, from the time she was first seen from the Cella, until the collision, she had not changed her helm.

There having been no fault on the part of the schooner, and it having been the duty of the Cella to avoid her, it follows that, as no excuse is established by the Cella, she must be held liable. Under these circumstances, it is of no consequence to account for the collision, or to speculate as to how it could have happened. And yet, on the evidence, it is quite manifest where the particular fault of the Cella was. She made two colored lights on her starboard bow, which, with the wind south, and the Cella heading west half north, clearly indicated that the lights belonged to a sailing vessel which was sailing on the wind. The Cella at once ported her helm. This seems to be the universal practice of a steamer, in meeting a sailing vessel, whether it be the proper manœuvre

or not to enable the steamer to fulfil the duty, imposed upon her by law, of keeping out of the way of the sailing vessel. In this case, the manœuvre was faulty. The Cella ought to have starboarded her helm, and there would have been no collision. In the first place, she made no allowance for the leeway which the schooner would make in sailing on the wind, with the wind as it was. In the second place, the testimony of the master of the Cella shows, that, with the wind fresh from the south, as it was, and the Cella down by the head, as she was, the wind catches her stern and keeps her head to the wind, that is to port, as she was then heading, and tends to counteract the usual effect of porting the wheel, and that, if her engines had been stopped, she would, even with a port helm, have come around with her head to the wind, that is, to port. This manifestly shows that her mistake was in porting, instead of starboarding. That, with the leeway of the schooner, brought the vessels together. If the Cella had starboarded, her helm, with the effect of the wind on her stern, would have brought her head around rapidly to port, even though her machinery had not been stopped, and, with the leeway of the schooner, each vessel would have passed a wide distance on the starboard side of the other.

The steamer is responsible for all the damages which ensued, from the collision, to the schooner and her cargo, including those consequent upon the running in shore and the stranding of the schooner. There must be a decree for the libellants, for such damages, with the costs of the suit, the damages to be ascertained by a reference.

Scudder & Carter, for the libellants.

Beebe, Dean & Donohue, for the claimants.

Eastern District of New York,

MARCH, 1869.

JOSEPH W. DYER *et al. vs.* THE NATIONAL STEAM NAVIGATION COMPANY.

Collision off Fire Island.—Ship and Steamer.—Stopping.—Lookout.

Where a ship and a steamer were both sunk by coming in collision at sea, the night being dark but starlight, the wind being from the north northwest, the ship sailing to westward close hauled on her starboard tack, about seven and a half knots an hour, and the steamer sailing ten to eleven knots, on a course stated by the officer of her deck to be east and by her master to be southeast three fourths east:

Held, That although evidence was given, on behalf of the steamer, estimating the distance of the ship, when she was first seen, at several miles, yet estimates of time and distance cannot be relied on, and are here overborne by the sequence of events, stated by the witnesses, which shows that when the steamer's helm was first changed, it was got hard-a-port as soon as possible and the engine at once stopped and reversed;

That, therefore, it must be concluded that either the ship was not seen by the lookout as soon as she ought to have been, or if seen, failed to receive proper attention from the officer of the deck, of which last fact there was some other evidence in the case;

That if the ship was seen three or four miles off, as claimed, the steamer was in fault for not sooner stopping and backing, for the helm was shown to have been ported as soon as she was seen, and yet the witnesses testified that porting made no change in the bearing of the ship. It was her duty, under such circumstances, as soon as she discovered she was not shaking off the ship's light by porting, to have checked her speed and ascertained which way the ship was sailing;

That on the evidence the fault charged against the ship of not holding her course was not made out;

That the lookout on the ship having been killed by the collision and having been proved to have been on duty before the collision and to have reported the lights of the steamer, no fault could be charged upon the ship in this regard;

That the owners of the steamer were liable for the damages occasioned by the loss of the ship in the collision.

BENEDICT, J. This is a cause of damage arising out of the following circumstances: The ship Kate Dyer owned by the libellants was, on the night of the eighth day of September, 1866, off Fire Island, bound from Callao to New York, fully laden. The night was dark, and bitter cold, but starlight, and a ship's lights could be seen for several miles. The wind was blowing fresh from the north north-west, and the ship was sailing to westward, close hauled upon the starboard tack at a speed of about seven and a half knots, with all the proper lights displayed and in charge of a pilot.

The steamer Scotland, owned by the defendants, and bound from New York to Liverpool, was proceeding at a speed of ten to eleven knots, upon a course declared by the officer of the deck to be due east, and by the master to be southeast three fourths east, displaying also the proper lights. The two vessels came in contact at about right angles, the steamer striking the starboard bow of the ship, and having at the time sufficient headway to carry her over the ship and for a considerable distance to leeward before she was stopped.

The effect of the collision was such as to cause the ship to go to the bottom so rapidly that twelve of the persons on board, including the mate, were drowned, while the steamer herself was so injured that although at once put about she could only reach the Outer Middle, when she sunk and became also a total loss. This action is brought to recover the damages caused by the loss of the Dyer, her cargo and freight, amounting in all to some $255,000.

The averments of the libel, bearing upon the points in controversy upon the evidence, are that the night was fine and clear and the ship close-hauled; that the mast-head light of the steamer was seen about two points over the starboard bow of the ship and distant two and a-half to three miles; that the ship held steadily to her course, and, as the light approached, it grew broader and broader

abeam, but closer and closer to the ship, and it was apparent that the steamer was attempting to cross the ship's bows, with her helm nearly or quite hard a-port; that danger seeming imminent, the ship's helm was put hard up and the spanker let go, but, before the orders could be obeyed, the steamer came into the ship at full speed striking her upon the starboard bow.

The answer admits that the night was clear, and avers that the steamer's lights could be seen at a much greater distance than three miles; that the Scotland was on a course about east, and, while so heading, discovered the lights of the ship about one and a-half points off the port bow; that in order to give the ship a wide berth, and when the ship was at least three to four miles off, the helm of the steamer was ported, altering her course to starboard, as she proceeded; that, thereafter, the persons in charge of the steamer discovered that the ship was falling off to the southward and down on the steamship, and that the only thing then left for the steamer was, to put her helm hard a-port and stop and back, which she did, and at the time of collision had changed about four points, being struck by the ship on her port bow.

The evidence produced in support of these respective averments is contradictory, and, in some particulars, unsatisfactory. I have given to the difficulties which it presents my best attention, and, after careful consideration, am of the opinion that little doubt can be entertained as to what should be the proper decree. It will be more convenient to examine first the evidence introduced by the steamer in regard to her own movements.

This evidence presents certain features, and discloses certain attendant circumstances, which at the outset challenge attention. For it appears that the starboard watch of the steamer was on duty, but, up to the time of the alarm, the master was below at supper—that the second officer was in charge of the deck, but was not at his proper station upon the upper bridge, until after the

ship was reported—that two men are stated to have been stationed on the lookout forward, but neither of them is produced, and the omission is unexplained—that two men were at the wheel, but neither of them is produced by the claimant and they are called by the libellants—that no witness called from the steamer is able to say which of the side lights of the ship was presented to the steamer, although it is beyond question that these lights were plainly to be seen, and, according to the theory of the defence, the ship was seen at a distance of some miles and watched till she struck.

These circumstances become significant when the accounts of the collision given by these witnesses are examined.

Turning then to these accounts, a careful comparison of the various statements of fact renders it quite apparent that the attention of the officer in charge of the movements of the steamer was not fastened upon the ship, until she was near enough to show her sails, and so close that, although the helm of the steamer was put hard-a-port, and the engine stopped and reversed at full speed, she struck the ship before her headway was seriously reduced.

If this be so, the steamer must be held in fault. She was sailing at a rapid rate, in a locality requiring the utmost watchfulness on account of the danger of meeting vessels. By the exercise of a proper care, the ship could have been seen, and her course determined, in abundant time to have enabled the steamer to take, with proper deliberation, steps to avoid her, and the failure to give proper attention to the approaching ship, in time to avoid her, was negligence.

In coming to the concluslon that the ship was not seen by the officer of the deck until she was close upon him, I have not overlooked those portions of the testimony which are relied on as supporting the averments of the answer, that the ship was seen at a distance, and

the steamer's helm then ported. But estimates of time and of distance cannot be relied upon, and here they are overborne by the sequence of events stated by these witnesses, which shows that when the helm of the steamer was first changed, it was got hard down as soon as possible; and that this was simultaneous with the stoppage and reversal of the engines; and that all this was done as soon as the second officer ascended the bridge. The engine was reversed by Hunt, the third officer, who hastened from below on hearing the order to shift the wheel, and the ship was, as he says, then only 200 yards distant.

This failure sooner to notice the ship, and take steps to avoid her, may have arisen from the absence of an attentive lookout, or from a failure on the part of the officer of the deck to observe the reports of the lookout, if any such there were, and in this connection the omission to produce either of the men claimed to have been upon the lookout is very noticeable; while the statement of one of the crew of the steamer, who was upon the forecastle, and is called by the libellants, that the first report of the ship's light from the forecastle received no attention, tends to increase the significance of the omission. The statement of this witness is, moreover, strengthened by the circumstance that, although the deposition containing the statement was taken in December, 1866, and the witness then named several others of the crew who were on the forecastle with him, none of those witnesses are called to contradict him.

But, assuming it to be true, as claimed on the part of the steamer, that the ship was seen when three or four miles off, and that the steamer's helm was then ported, she would still be guilty of negligence, in not sooner stopping her engine.

The witnesses from the steamer declare that, from the time the ship's light was seen, up to the moment of the collision, the bearing of the ship, in reference to the

steamer, did not change. According to this theory, then, the steamer, at a distance of three or four miles, began sheering to leeward, and actually made a leeway of a mile before coming in contact with the ship, during all which time it was apparent from the bearing of the ship's light, that the change of course in the steamer was not changing the relative bearings of the vessels. Under such circumstances, it was the duty of the steamer, as soon as it was noticed that she was not shaking off the light by porting her helm, to have slackened her speed, and ascertained the direction in which the ship was sailing, and acted accordingly; instead of which, she kept up her full speed till the collision was inevitable. It cannot be doubted that, if the steamer, at the distance of a mile, even, had stopped her engine, no collision would have occurred. Whether, then, it be considered that the Scotland failed to pay proper attention to the ship until close upon her, or that, having seen her at the distance of three or four miles, she continued at full speed until the collision was inevitable, running in the interval a mile to leeward of her course, with the ship's light all the time bearing within a point or two of her port bow, it must be held that the steamer was guilty of negligence.

There only remains, then, to consider whether any fault is shown on the part of the ship, which conduced to the collision. The principal fault charged upon her is, that she did not hold her course, but kept away, falling off to the southward, and down upon the steamship.

In considering the evidence bearing upon this point, it is to be noticed that no witness produced on behalf of the steamer testifies that he saw any change whatever in the ship's course; and, as before remarked, although the ship was displaying the proper colored lights, which, in the language of the sea, proclaimed her course to the steamer, if observed by her, no witness on the part of the steamer is able to say which side light the ship dis-

played to the steamer—a fact, by the way, entirely consistent with the conclusion that when the ship was first seen by the persons in charge of the steamer, she was too near, and the danger too imminent, to warrant any observation of her side lights, but difficult to reconcile with the statement that the ship was watched for the space of three or four miles.

The only evidence in the case, then, going to show a change of course on the part of the ship, is the statement of the claimants' witnesses, that when they saw the sails of the ship, it was evident that she was off the wind, and off from her proper course. But when the ship's sails were seen, she was close at hand, and this evidence is, therefore, entirely consistent with the statement of the pilot, second officer and wheelsman of the ship, that no change in their course was made until the steamer was seen to be approaching them at full speed and close by, when the wheel was put hard up and the spanker sheet let run. As contradicting this evidence on the part of the libellants, and supporting the account that the ship kept away when at a distance from the steamer, the claimants have laid great stress upon the evidence that the ship's light was seen over the steamer's port bow and that the green light of the steamer was not seen on board the ship, which it is insisted shows that the ship was to northward of the steamer and, therefore, must have kept away to the southward and towards the steamer in order to be found in her track.—But if the ship were to northward of the steamer and if, as the claimants insist, the steamer was continually bearing to the south, inasmuch as the ship was running only seven and a half knots to the steamer's ten, it is not easy to see how it would be possible for the ship to get in advance of and to southward of the steamer so as to be found in her track—while on the other hand, if the ship was on a course west half south and the steamer on the course stated with great particularity by her master to

be south of east, the ship might be to southward of the steamer and yet be seen over the steamer's port bow, while the steamer would be seen over the ship's starboard bow. The red light of the steamer would thus be displayed to the ship and the green light at no time visible, while the green light of the ship would be displayed to the steamer, giving her notice that she was crossing the course of the ship.

I am unable, therefore, to say that the evidence in regard to the light seen from the respective vessels—which is by no means free from contradictions—will justify the conclusion that the collision was caused by the ship's falling away to leeward and towards the steamer.

As bearing upon this point, stress has also been laid upon evidence in the cause showing that the persons in charge of the ship believed the steamer to be a tug, and it has been insisted that this circumstance renders it highly probable that the ship did keep away, in order to meet her—a course otherwise improbable as the ship was situated.

But the movements of the ship do not appear to me to indicate any intention on her part to speak to or be taken in tow by the supposed tug, and I am unable to discover from the evidence, that the supposition that the steamer was a tug, had any effect upon the course of the ship.

My conclusion, therefore, upon this branch of the case, is that the collision cannot be attributed to the fault of the ship, in not holding her course.

The only remaining question necessary to notice is that raised in regard to the lookout on the ship. But as to this no doubt can exist upon the evidence. The man alleged to have been on the lookout is proved to have been seen and spoken to just previous to the collision, upon his station; his reports of the approaching light are proved, and he was seen and spoken to just before

the ship went down, lying forward in a dying condition, having been crushed, doubtless, by the spars which fell forward when the vessels struck. Upon this point, therefore, no fault can be found against the ship.

I have now noticed all the material questions of fact and of law which have been raised in this difficult case, and in announcing a conclusion in favor of the libellants, as I do, without hesitation, upon the whole case as it stands, I may add that it is a satisfaction to me to know that the cause, as well because of its importance, as of its difficulty, will without doubt be re-examined in the appellate Court, and if I have fallen into error, my decision can there be corrected.

Let a decree be entered in favor of the libellants, with an order of reference to ascertain the amount of the damages.

For libellants, *E. C. Benedict* and *Scudder & Carter.*

For respondents, *C. Donohue and Jno. Chetwood.*

Northern District of New York,

MARCH, 1869.

THE SCHOONER FOREST QUEEN.

COLLISION ON LAKE ERIE.—STEAMER AND SCHOONER.—LOOKOUT.—PRESUMPTION OF FAULT.—CHANGE OF COURSE.

Where a collision takes place between two vessels, neither of which had a proper lookout, it is most likely that both vessels were in fault.

Where it is not clear what particular fault or faults should be deemed to be the more immediate and real cause of the collision, the absence of a lookout, and

the want of careful attention to his duties on the part of the officer in charge of each vessel may be considered to be the causes of the disaster.

Inability of the officer in charge of a steamer to give instant orders to the engineer, when a collision is impending, is negligence.

A change of course made by a sailing vessel, in accordance with a hail from an approaching steamer, cannot be considered as a fault chargeable to the sailing vessel.

THIS was an action for collision, brought by the Western Transportation Co. owners of the propeller Tonawanda, against the schooner Forest Queen. The collision occurred on the night of the 22d of October, 1868, near Long Point in Lake Erie.

The propeller was about two hundred feet in length, and her speed was about eight or nine miles an hour. Her lights were good and the night though dark was not foggy. The master of the propeller, who had had the watch on deck for more than an hour, testified among other things, that the wind was about north, blowing quite fresh, and that the propeller's course was east by south; that he was standing a little abaft the capstan when he first made the white light of the Forest Queen, about twenty minutes before the collision, and about a point on the port bow of the propeller; that he remarked to his second mate that it was Long Point light; that his second mate took the glass and looked at the light and said, "No, sir, it is a vessel, I can see her green light;" that he (the master) then took the glass and could see both her red and green lights; that the schooner stood along, showing both lights five minutes, more or less; that she then shut in her green light and showed her red, and then bore about a point off the propeller's bow; that she stood along in that position ten or fifteen minutes, showing only her red light, which seemed to open on his port bow, and that the propeller continued on in her course of east by south; that the red light opened on his port bow until it bore from two to two and a half points off that bow, when the schooner shut in her red and

showed her green light; that she might then have been a quarter of a mile off, and that up to that time there had been no indication of danger; that he then spoke to his second mate and said: "She has shown her green light; what is the meaning of that?" and that his reply was, "She has probably thrown off a little and will straighten up in a moment;" that he (the master) then took the glass and saw that the schooner was "standing right for" the propeller, and that the second mate at the same time started for the pilot house; that he (the master) ordered the wheel "right a-port" as soon as he saw the green light through the glass, and ordered it "hard a-port," in two seconds or but a few seconds after he saw the green light without the glass; that the wheelsman answered his order, and that, a minute or a minute and a half afterwards, the vessels struck; that he should judge the propeller had swung from two to three points before she was struck; that the schooner struck the propeller on her port bow, about twenty or twenty-two feet from her stem, and at an angle of about five points between the sterns of the two vessels, as near as he could judge; that the lookout had been on duty all night and had gone aft, about five minutes before the collision, and was then aft; that, while he was aft, the witness and his second mate were on the promenade deck; that he did not think there was time, after the red light was shut out and the green light appeared, to stop and reverse his engine; and that, when the schooner was four or five lengths from the propeller, he sung out to the schooner to put his helm hard up (to the starboard.)

The testimony of the master of the schooner (who was also part owner) showed that she was one hundred feet in length; that the collision occurred about half past two o'clock and that he had not left the deck that night; that he made the light of the propeller about twenty minutes before the collision, and from half a point to a point on the schooner's starboard bow; that he then took

it to be a green light; that the schooner's course was then west by south, but that he immediately changed her course to west south west, and that she was kept steady on that course until just before the collision; that immediately after giving the order to change her course to west south west, he observed that the propeller's light was from a point and a half to two points off his starboard bow; that the schooner went on steady on her course of west south west, and the propeller's light opened more on his starboard bow; that ten minutes before the collision the man who had been on the look-out was sent aft, to assist at the wheel and keep the schooner steady, the wind being puffy; that he (the master) remained between the fore-rigging and the fore-mast, and that the greatest distance the light bore on his starboard bow was about four points; that, when that was the bearing of the light, he observed a change in the propeller's course, and got a dim sight of her red light; that he had not before seen either of her colored lights; that after seeing the red light, and at the same time, came the call from the propeller to put his wheel hard up, and he sung out to the men at the wheel, "hard up," and got a response from both of them; but before there was time to get the wheel more than half up, the vessels struck at about a right angle.

For libellants, *Geo. B. Hibbard.*

For claimants, *Albertus Perry.*

HALL, J. Upon the pleadings and proofs, it is entirely clear that the collision was caused by gross negligence, or grosser unskillfulness; but it is not entirely certain whether it was caused by a fault or faults imputable to only one of the vessels, or whether both vessels were in fault. It is, however, certain, that neither of the vessels had a proper lookout, at the time when the

services of a competent and faithful lookout would have been of the most essential service in preventing the collision; and it is, therefore, most likely that both were in fault.

The absence of a proper lookout, and the want of careful attention to his duties, on the part of the officer of the deck, of each of the vessels, may sufficiently account for the absence of any testimony showing what particular fault or faults should be deemed the more immediate and real cause of the collision; and these circumstances may well be considered as the remote, if not the proximate, causes of the disaster.

The evidence in the case is, in most respects, unreliable and unsatisfactory; and there is not only much conflicting testimony, but it is also quite difficult, if not impossible, to reconcile many of the statements of the witnesses, on either side, with some of the admitted facts of the case.

As examples of the difficulty just alluded to, it may be useful to refer to the testimony of the master of each of the colliding vessels, in respect to their relative position, at the time each observed the change in the course of the other vessel;—to which change he attributes the collision. It should, first, be remarked, that the vessels were running in nearly opposite directions—there being but a single point between the lines of their respective courses—and that the speed of the propeller was about eight miles, and that of the schooner about nine miles, an hour. The testimony of the master of the propeller tends to show that the change of the schooner's course was made when she was about eighty rods distant, and from two to two and a half points off the propeller's port bow. Now, if this is correct, the schooner—fixing her position at two and one-fourth points off the propeller's bow—was more than thirty rods to the northward of the line of the propeller's course, and only about seventy-four rods to the eastward; and it is incredible

that the schooner could have changed her course, as stated, and have reached and struck the propeller, except by a well-directed and persistent effort to follow the propeller, and produce a collision. On the other hand, the testimony of the master of the schooner tends to show, that the change of course made by the propeller, was made four or five minutes before the collision, and when she was four points off his starboard bow—a statement more incredible than that of the master of the steamer, as the bearing was more off the bow, and the schooner's speed exceeded that of the propeller;—especially, as the propeller's wheel was ported at the time of the change, and the testimony of the master of the schooner is, that the course of his own vessel was not changed, until it was changed under a hail from the propeller; and as the position of the claimant is, that it was not changed until it was apparently necessary, to lessen the chances, or diminish the force of the collision, which, as the event proved, it was then too late to avert. In truth, this case is one in which no very satisfactory conclusion in regard to the material questions of fact, controverted at the hearing, can be reached; but, unless several witnesses have been guilty of deliberate perjury, it must be conceded, (notwithstanding there is testimony from other witnesses which would lead to a different conclusion,) that each vessel exhibited her proper signal lights; and, that such lights might have been seen at a distance of more than two, if not more than three, miles, on the night of the collision. It is, therefore, clear that the collision was caused by negligence or fault in the management of these vessels, or of one of them.

Upon the whole evidence, it is clear, that the propeller was in fault, because she had no competent lookout stationed and kept on duty, during the time when the services of a lookout were most essential, for the purpose of preventing the collision which occurred. It is quite certain that, with a proper lookout, and a com-

petent officer of the deck, in the best position to secure prompt action on the part of the engineer and wheelsman, the collision might have been avoided. The officer of the deck was at a distance from the point where he should have been, to communicate instant orders to his engineer; and the consequence was, that no orders to stop the engine were given. This should have been done, and the omission must be considered as a fault which may have contributed to the collision.

It is clearly shown that the schooner was in fault, in not having a competent lookout stationed and kept in the faithful discharge of that duty. The failure to observe the colored lights of the propeller shows that no sufficient lookout was kept by any one; and the master, knowing that the lookout had been sent aft, did not use ordinary care in the discharge of his duty as officer of the deck. The negligence thus distinctly proved, the testimony on the part of the libellants, and other circumstances, create grave doubts in regard to the correctness of the statements in respect to the steady and continued course of the schooner; and these doubts are much increased by the difficulty of accounting for the collision, upon the case made by the claimants—assuming a change of course, on the part of the propeller, when her light was four points off the starboard bow of the schooner.

Besides the faults which have been already imputed to the propeller and schooner, it is now quite certain that, if the propeller had put her helm hard-a-starboard, when it was put hard-a-port, there would have been no collision, if the schooner's course and change of helm were such as appears from the testimony; and if the propeller's course and change were those stated by her master, it is also quite clear that there would have been no collision, if the schooner's helm had been put hard-a-port, when it was put hard-a-starboard, or even if the schooner's course had remained unchanged. The change of course was, doubtless, made by both vessels, very near

the same time, and each must have swung about three and a half or four points—or one somewhat more, and the other about as much less, than that—in order to strike at the angle they did actually strike, as established by the pleadings and evidence. Indeed, the testimony of the master of the propeller even indicates a greater change than that, or nine or ten points of change, to be divided between the two vessels.

The change made by the schooner, under the hail made by the master of the propeller, cannot be a fault chargeable to the schooner; and my experience in collision trials has satisfied me that a master who assumes to take command of an approaching vessel, with which his own is likely to come in collision, generally acts unwisely. The master of a steam vessel is rarely called upon to direct a change of helm on an approaching sailing vessel, unless his own negligence has previously brought the two vessels into imminent danger of collision.

From the best consideration I have been able to give the case, it must be considered one of mutual fault, and the damage to both vessels must be aggregated, and then equally apportioned; and no costs will be allowed to either party, as against the other.

Southern District of New York,

APRIL, 1869.

FIFTEEN PIECES OF BLACK SILK.

BONDING PROPERTY SEIZED AS SMUGGLED.

Where goods were seized as smuggled, and a libel was filed without delay to forfeit them and a claim was put in by an agent of the owner of the goods, who applied for an appraisement of the property and its delivery to him on bond:

Held, That the 89th section of the Act of 1799, (1 *Stat. at Large*, p. 695,) applies only to seizures for violations of that Act;

That a delivery on bail in this case was a matter of discretion, and that, as there had been no delay in the prosecution and the goods were not perishable, the application to bond must be refused.

BLATCHFORD, J. This is an information in a cause of seizure and forfeiture of certain goods for an alleged violation of the 46th and 68th sections of the Act of March 2d, 1799, (1 *U. S. Stat. at Large*, 661, 677,) and of the 4th section of the Act of July 18th, 1866, (14 *Id.*, 179.) On the facts shown to the Court, the goods were smuggled into the United States, in the ship Australasian, from Liverpool, by a passenger from Liverpool, as personal baggage. A claim has been filed to the goods, by one Josias Taylor, as agent for one George Pursey, who is sworn by Taylor to be the owner of the goods and to reside in London. An application is made to the Court by the claimant for the delivery of the goods to him, as such agent for such owner, on an appraisement thereof and the execution of a bond therefor, in pursuance of the requirements of the 89th section of the Act of March 2d, 1799.

I concur with Mr. Justice Story, (*The Brig Struggle*, 1 *Gallison*, 476,) in the view, that the provision for the

bonding of seized property, made by the 89th section of the Act of 1799, applies only to seizures for violations of that Act, and that, even under that section, a delivery on bail is not compulsory on the Court, but is a matter of sound discretion. It is, therefore, discretionary with the Court, as regards both of the statutes under which this case is prosecuted, whether it will deliver the goods on bail.

It appears, by the papers, that Pursey, the alleged owner, came as passenger in the ship, and himself conducted in person the smuggling proceedings on board of the vessel, which consisted in representing the property as personal baggage, and in offering money to the inspector to pass it. Why Pursey does not himself make the claim and verify it is not explained, nor does he make any affidavit in explanation of the facts sworn to by the inspector. In view of the provisions of the 4th section of the Act of 1866, that, in all cases where the possession of goods brought into the United States contrary to law shall be shown to be in a defendant, or where he shall be shown to have had possession thereof, such possession shall be deemed evidence sufficient to authorize conviction, unless the defendant shall explain the possession to the satisfaction of the jury, and of the fact that the claimant in this case swears that Pursey is the owner of all the property, and that it is apparent, from the papers, that Pursey was in possession of all of the property on board of the vessel, and of the circumstances of the smuggling, I cannot regard this as a proper case in which to allow the property to be delivered on bail. Mr. Justice Story, in the case before referred to, says: "I cannot say that I approve of the practice of an indiscriminate delivery of property seized, on giving bail for the appraised value. It is attended with many inconveniences and often leads to frauds. In the Exchequer, in England, no delivery is allowed, unless the property be perishable, or the government officers have

been guilty of laches and delay in the prosecution." Such a practice is a sound one. The property in this case consists wholly of dry goods and not at all of perishable articles, nor has there been any delay in the prosecution. The seizure was made March 5th, 1869, and the libel was filed March 13th, 1869.

The application is refused.

T. Simons, (*Assistant District Attorney*,) for the United States.

M. V. B. Wilcoxson, for the claimant.

APRIL, 1869.

IN THE MATTER OF MATTHEW O'FARRELL & DANIEL O'FARRELL, BANKRUPTS.

Death of Bankrupt.—Discharge.

If a bankrupt dies during the bankruptcy proceedings, so that he cannot comply with section 29 of the bankruptcy Act, a discharge cannot be granted to such bankrupt, notwithstanding the provision of section 12 of the Act, that, "if the debtor dies after the issuing of the warrant, the proceedings may be continued and concluded in like manner as if he had lived."

In this case, after the first meeting of creditors, one of the bankrupts, Matthew O'Farrell, died. In the course of the subsequent proceedings, a witness was called on behalf of the dead bankrupt, to give certain evidence with a view that a discharge of such bankrupt might be issued. The evidence was objected to, and the Register certified to the Court the question, whether, if the debtor dies, after the issuing of the warrant in bankruptcy, the proceedings may be continued and concluded

and a discharge granted, as to him, in like manner as if he had lived.

BLATCHFORD, J. Although the 12th section of the Act declares, that, "if the debtor dies after the issuing of the warrant, the proceedings may be continued and concluded in like manner as if he had lived," yet, in view of the fact that the provision is found in a section which relates, exclusively, to proceedings to appropriate the debtor's property to the payment of his debts, and of the further fact that, if the bankrupt is dead, he cannot apply, under section 29, for a discharge, and cannot sign the petition, Form No. 51, and cannot take and subscribe the oath required by section 29, I do not think that the word "proceedings" in section 12, can be held to include a discharge, unless there is a compliance with the requirements of section 29, in regard to the application for a discharge and the oath.

APRIL, 1869.

THE SCHOONER TRANSIT.

COLLISION AT SEA.—SCHOONER & PILOT BOAT.—FREE WIND.—VESSEL LYING TO.

Where a schooner, heading south southwest with the wind northwest, saw a pilot boat about a mile and a half off and about two points on her port bow, and the pilot boat, which was lying to, under a reefed mainsail and a jib with one bonnet out, and with her helm lashed to starboard, was heading about north, and making about a mile an hour, luffing up so as to cause her sails to shake and then falling off, and the schooner kept on without changing her course, although this luffing up and falling off of the pilot boat was seen several times, until the pilot boat, when about eighty yards off, took another luff across the bows of the schooner, which then, but too late, starboarded her helm:

Held, That, under the 12th Article of the Act of April 29th, 1864 (13 *Stat. at Large*

p. 60,) it was the duty of the schooner to keep out of the way of the pilot boat, because the latter, though having the wind on her port side, was close hauled.
That the schooner was in fault in not sooner changing her course;
That the pilot boat was bound, under Article 18, to keep her course, but she kept no course at all. It was her duty, when the schooner was seen approaching, to have unlashed her helm and kept steady on a course;
That the damages must be apportioned between the two vessels.

BLATCHFORD, J. This libel is filed by the owners of the pilot boat A. T. Stewart, to recover the sum of $4,969.20 for the damage caused to that vessel by a collision that occurred between her and the schooner Transit, on the morning of the 22d of May, 1866, about sunrise, in the Atlantic Ocean, some twenty miles east of Cape May Light Ship. The Transit was on a voyage from New York to Chesapeake Bay, and was on her course down the coast, heading south southwest, the wind being northwest, and two points abaft her beam on her starboard side, and blowing so much that, just before the collision, she had to take in her top sails. The pilot boat was heading about north, with a reef in her mainsail, her foresail furled and one bonnet out of her jib, and her helm lashed to the starboard. She was, therefore, closehauled, within about four points of the wind and with the wind on her port side. She had been in that condition all the preceding night, and was making headway at the rate of not over one knot an hour. It appears, by the testimony of the second mate of the Transit, that he and the master of the Transit saw the pilot boat at the distance of about a mile and a half off, about two points on the port bow of the Transit; that he noticed, as the two vessels approached each other, that the pilot boat was luffing up and then keeping off, her luffing up being to such an extent as to cause her sails to shake, and her falling off being to the extent of two points, and that, when she fell off and went ahead, her course would be for the port quarter of the Transit, and when she luffed up she would shoot across the bows of the Transit, and

that this luffing up and falling off by the pilot boat was repeated several times, and noticed from the Transit, while the two vessels were so approaching each other. During all this time, notwithstanding this wild manœuvring on the part of the pilot boat, no change was made in the course of the Transit. She might easily have put her helm to starboard and gone under the stern of the pilot boat, but she persisted in trying to go to the windward of the pilot boat and across her bows. Finally, when the two vessels were about eighty yards apart, the pilot boat took another luff sharp across the bows of the Transit, and then, but too late, the helm of the Transit was put to the starboard and she tried to go to the leeward of the pilot boat, but failed to clear her, and struck her on her starboard bow, about eight feet from her stem, breaking her foremast into three pieces, and causing other damage. Under Article 12 of the Act of April 29th, 1864, (13 *U. S. Stat. at Large*, 60,) it was the duty of the Transit, because she had the wind free, although she had it on the starboard side, to keep out of the way of the pilot boat, because the latter, although she had the wind on the port side, was close hauled. The Transit was clearly in fault in not starboarding her helm sooner, in view of the movements of the pilot boat, which were plainly to be seen and were seen from the Transit. But I think the pilot boat was also in fault. It was her duty, by Article 18, to keep her course, in order to allow the Transit to keep out of the way. But she kept no course whatever. She was making headway at the rate of about a knot an hour, and, when she saw the Transit approaching, her helm should have been unlashed and she should have been kept steady on a fixed course, and not have been suffered to luff and fall off. It was reckless in her to keep her helm lashed, when she saw the Transit thus approaching, and it was equally reckless in the Transit to try and cross the bows of the pilot boat,

under the circumstances. The damages, when ascertained, on a reference, must be divided. The question of costs is reserved, till the coming in of the report.

Beebe, Dean & Donohue, for the libellants.

Benedict & Benedict, for the claimants.

APRIL, 1869.

THE STEAM FERRY-BOAT BALTIC.

DAMAGES BY COLLISION.—EXCEPTIONS.—INTEREST ON REPAIRS.—DEMURRAGE.—COSTS.—APPORTIONMENT.

In estimating the damages caused by a collision, interest at six per cent. on the sum paid for the repairs of the injured vessel, is to be added.

To recover demurrage, the party must show, by evidence, that he sustained loss of service of his vessel, and that he sustained damage by such loss.

Where, in a suit brought to recover damages for collision, the Court held both vessels in fault, and that the damages must be apportioned and ordered a reference to ascertain the damages, and the Commissioner reported an amount as "due to the libellant:"

Held, That the Commissioner should have reported that sum as "the damages sustained by the libellant by reason of the collision," and that the report should be amended accordingly;

Where both parties excepted to the Commissioner's report, and the libellant's exceptions were all overruled, and the claimant's principal exception was allowed, and it appeared that the evidence before the Commissioner related almost wholly to items which were disallowed:

Held, That, the costs of the reference and of the exceptions should be allowed to the claimant, but the costs of the cause to and including the interlocutory decree should be allowed to the libellant;

That, if the difference between the two bills of costs was in favor of the libellant, it should be added to his recovery, but, if in favor of the claimant, it should be deducted from the recovery, or, if larger than the recovery, the latter should be deducted, and the claimant have a decree for the remainder.

The Steam Ferry-Boat Baltic.

BLATCHFORD, J. This. a case of collision, in which a decree was made to the effect that the collision was caused by the negligence of both vessels, and that the damages should be equally apportioned. A reference was ordered to ascertain the damages and the question of costs was reserved. The Commissioner reports as due to the libellant on account of the matters mentioned in the pleadings, $959.13. No reference to report the amount so due to the libellant was made to the Commissioner. What the Commissioner ought to have reported, and what, from the evidence, he manifestly intended to report, was, that the $959.13 was the damages sustained by the libellant by reason of the collision. The report must be amended so as to conform to the fact and to the order of reference. I shall treat it, however, as being a report that the damages sustained by the libellant, by reason of the collision, amount to $959.13. Both parties have excepted to the report. The $959.13 is made up of three items: (1.) Repairs to the libellant's vessel, $392.22; (2.) Ten days' demurrage, at $45 per day, $450; (3.) Interest on the $392.22, from December 26th, 1863, to the date of the report, at the rate of six *per cent. per annum*. The libellant has filed seven exceptions to the report, claiming: (1.) That the interest on the $392.22 should be at the rate of *seven per cent. per annum*; (2.) That the libellant ought to have been allowed interest at the rate of seven *per cent. per annum* on the $450 demurrage; (3.) That the libellant ought to have been allowed $1,000 for permanent injury sustained by his vessel by the collision; (4.) That he ought to have been allowed interest on such permanent injury. The fifth, sixth, and seventh exceptions of the libellant are to the exclusion by the Commissioner of testimony offered by the libellant on the reference. The claimants have put in two exceptions to the report, claiming: (1.) That no interest should have been allowed on the amount of the cost of repairs; (2.) That no demurrage should have been allowed to the libellant.

There is no dispute as to the propriety of the allowance of the $392.22. Interest on that amount, it being the amount actually paid for repairs put on the libellant's vessel, as a consequence of the collision, forms a proper item in the damages; and the proper rate is six *per cent.* and not seven *per cent.* (*The Ocean Queen*, 5 *Blatchf. C. C. R.*, 493.)

As to the demurrage, I think the Commissioner erred in allowing it. No proper case for its allowance is made out by the evidence, within the ruling in *Williamson* v. *Barrett*, (13 *Howard*, 101, 110, 111.) The libellant wholly fails to show, by evidence, that he sustained any loss of service of his vessel, during the ten days while she was undergoing repairs, or that he sustained any damage by any such loss.

The claim for an allowance for permanent injury was properly rejected by the Commissioner. The evidence on the part of the libellant on that subject is altogether vague and inconclusive, and the weight of it is, that the vessel was in as good condition after the repairs were made as she was before the collision.

I see no error on the part of the Commissioner in excluding evidence.

All the exceptions on the part of the libellant are overruled. The first exception on the part of the claimants is disallowed and the second is allowed. The report of the Commissioner must stand as a report made December 16th, 1868, reporting the amount, at that date, of the damages sustained by the libellant, by reason of the collision, at $509.13. This amount, with interest at the rate of six *per cent. per annum*, to the date of the decree to be entered, will be apportioned equally between the libellant and the claimants' vessel.

As to costs, I give to the libellant his costs in the cause, to and including the interlocutory decree of May 2d, 1868, and the costs of entering the final decree. The costs of the reference under the interlocutory decree, and the

costs of the exceptions and of the hearing thereon, I award to the claimants, as the testimony before the Commissioner relates almost wholly to the items of demurrage and permanent injury, both of which are disallowed, and as the libellant's exceptions are all of them overruled, and the claimants' principal exception is allowed. If there is any balance in favor of the libellant, between the two bills of costs, it will be added to his recovery. If there is any balance in favor of the claimants, between the two bills of costs, it will be deducted from such recovery, if less than such recovery; and, if larger than such recovery, such recovery will be deducted from it, and the claimants will have a decree for the remainder.

Weeks and Forster, for the libellant.

Benjamin D. Silliman, for the claimants.

APRIL, 1869.

IN THE MATTER OF EDWARD BIGELOW AND OTHERS, BANKRUPTS.

Debt to Wife.

Where a wife having received money from her father's estate, put it in her husband's hands, with the verbal understanding that she was to have it when she wanted it, and afterwards drew all but $700, and it appeared that the husband had at various times given her furniture and stock, and taken out policies of life insurance for her benefit, and her husband was, some seven years after the receipt of the money, declared a bankrupt:

Held, That the wife was entitled to prove the $700, without interest, as a debt against her husband's estate.

In this case, objections were filed by creditors to a claim of Mary B. Bigelow against the estate of her hus-

band, Edward Bigelow. The Court referred the matter to the Register to take proof of the facts, and report to the Court, with his opinion.

The Register reported that the evidence seemed to establish the following facts:

1. Between July, 1859, and the spring of 1861, Mrs. Bigelow came into possession, by two several payments, of about $1,500 from her father's estate.

2. This money she handed over to her husband for safe keeping, with the verbal understanding that she was to have it when she wanted it.

3. She subsequently drew all but $700 of this money from her husband to purchase silver plate, leaving in her husband's hands the sum of $700, which she now claimed, together with interest thereon from 1859.

4. Her deposition for proof of her claim set out the demand as follows: "Is justly and truly indebted to this deponent in the sum of $1,141.00, being the balance of money belonging to this deponent, as her separate estate, which was left to this deponent by her father, David Boies, and which this deponent lent to her husband, the said Edward Bigelow, about 1859. The principal sum thus had by the said Edward Bigelow, as aforesaid, was $700, which, together with interest to the 16th of November, 1867, amounts to the said sum of $1,141.00," to which was added the formal part of the deposition.

5. No note or writing was made of this transaction, nor did Mrs. Bigelow keep any written account of the amount placed in, or drawn from, her husband's hands. She testified: "I kept along from year to year, as I expended money, a recollection as to the balance remaining due to me."

6. In August, 1863, she received from her husband, out of this fund, $20.00.

7. It was shown on the part of the contesting creditors, by the examination of Edward Bigelow and his wife, that,

since their marriage, Mr. Bigelow had given his wife certain household furniture, also a horse, harness, carriage, and sleigh, some stock in a silver mine, which cost $100, and also 20½ shares of turnpike road stock, on which 12\frac{50}{100}$ per share had been paid. There were also life insurance policies taken out for the benefit of Mrs. Bigelow and the children; and Mrs. Bigelow received $120 as the proceeds of hay raised upon Bigelow's farms, and sold by Mrs. B. in the fall of 1867, at or about the time of the commencement of bankruptcy proceedings against her husband.

The Register reported it, as his opinion, "that Mary B. Bigelow has a just claim against her husband's estate for the sum of $700, and that she should receive her dividends thereon with the other creditors."

BLATCHFORD, J. I concur in the views of the Register.

APRIL, 1869.

IN THE MATTER OF SPENCER D. SCHUYLER, A BANKRUPT.

DISCHARGE.—VOLUNTARY ASSIGNMENT.—ESTOPPEL OF CREDITOR.

Where creditors opposed the discharge of a bankrupt on the ground that he had made a voluntary assignment of his property for the benefit of his creditors, contrary to the provisions of the bankruptcy Act, and it appeared that, after the assignee had taken possession of the property under the assignment, an instrument in writing was executed by certain of the creditors, among whom were the opposing creditors, consenting that the assignee might transfer the assigned property to one R., and requesting said R. to "accept such transfer, take possession of said estate, dispose of the same, and distribute the nett avails thereof among all the creditors, according to the terms of said assignment," and thereupon the property was transferred to R. by the assignee:

In the Matter of Spencer D. Schuyler, a Bankrupt.

Held, That, on this state of facts, the opposing creditors were estopped from setting up the assignment in opposition to the discharge, and that a discharge would be granted when a certificate of conformity was furnished by the Register.

IN this case, the discharge of the bankrupt was opposed on the ground that he, on the 7th of December, 1867, made a voluntary assignment of all his property, for the benefit of all his creditors, to Joseph Wescott; that he was insolvent at the time; and that he made such assignment with a view to prevent such property from coming to his assignee in bankruptcy, and from being distributed under the bankruptcy Act, and to defeat the object of that Act, and impair, hinder, impede, and delay its operation and effect, and evade its provisions. The voluntary petition of the bankrupt was filed on the 17th of December, 1867. The opposition to the discharge was made by Hunt, Tillinghast & Co., and by Mott, Brothers & Co., creditors of the bankrupt. The voluntary assignee, Wescott, accepted the assignment, and entered on the execution of the trust under it, and took possession of the assigned property. Immediately on doing so, he found it would be impossible for him, in view of his other business employment, to attend to the execution of the trust, and thereupon a paper was prepared, bearing date December 10th, 1867, and was signed by many of the creditors of the bankrupt, and among others by Hunt, Tillinghast & Co., and Mott, Brothers & Co., which recited the fact of the assignment to Wescott, and that it was "a general assignment of all his property, in trust for the payment of all his creditors, without partiality or preference," and that Wescott was willing to surrender the trust, and that Charles Raymond was familiar with the affairs and business of the bankrupt, and then proceeded: "Therefore we, the undersigned, creditors of the said Schuyler, hereby consent, that the said Wescott may transfer the estate, property, and effects, which

came to him under said assignment, and we consent to and request of said Raymond, that he accept such transfer, take possession of said estate, dispose of the same, and distribute the nett avails thereof among all the creditors of said Schuyler, according to the terms of said assignment." In pursuance of such request and consent, Wescott, by an instrument in writing, dated January 2d, 1868, transferred to Raymond all the property which passed by the assignment from the bankrupt to Wescott, to convert it into money, and pay the debts of the bankrupt, in the manner specified by the assignment from the bankrupt to Wescott.

For the bankrupt, *D. W. C. Brown.*

For the creditors, *C. H. Smith.*

BLATCHFORD, J. On the above state of facts, it is insisted on the part of the bankrupt, that however obnoxious the assignment by the bankrupt to Wescott may be to the provisions of the bankruptcy Act, the creditors who take these objections are estopped from questioning the assignment, or urging the objections, by reason of the fact that those creditors, while enjoying the free election of ratifying or repudiating the assignment, have chosen to ratify it. I think this point is well taken. On the general principles of Equity jurisprudence, it is very clear that these objecting creditors would never be allowed, under these circumstances, to come into a Court of Equity, and impeach the voluntary assignment, either by a direct proceeding to set it aside or in any other way. They stand in the same light towards that assignment as if they had been parties to it on its face. If they themselves had been the voluntary assignees, executing the instrument of assignment, as Wescott did, they would not be allowed, as creditors, to attack it as fraudulent and void as against the bankruptcy Act. *Ex turpi causa*

non oritur actio. Yet their position is no different from what it would have been if they had been assignees under the assignment as well as creditors. They became parties to it by the paper they signed, and the effect of their signature to that paper, followed by the transfer from Wescott to Raymond, was the same, as regarded their relations to the assignment, as if their consent to the original execution of the assignment had been written thereon simultaneously with such execution. *Omnis ratihabitio retrotrahitur et mandato aequiparatur.* They would not have been allowed, after that, to urge the making of the assignment to Wescott as a ground for declaring the assignor an involuntary bankrupt. (*Langleg* v. *Perry, U. S. District Court, Southern District of Ohio*, 1 *Bankrupt Register*, 155, 156.)

There is nothing in the fact that the creditors in question are opposing the discharge of the bankrupt on the grounds urged, which should induce the Court to refrain from applying the principle of Equity law to which I have referred. The question of withholding a discharge for any of the reasons specified in section 29, when the bankrupt has taken the oath required by that section, and it appears that he has conformed to the modal requirements of the Act, is one wherein the creditors are the attacking party. If they enter no appearance and file no specifications, as required by General Order No. 24, setting up, as required by Form No. 53, some one or more of the causes specified in section 29 of the Act as grounds for not granting a discharge, they are regarded as not opposing the discharge, and as assenting to it, and the grounds for refusing a discharge, specified in section 29, are regarded as not existing in respect to the particular bankrupt. So, also, the provision of section 34, that a creditor, in order to attack a discharge after it is granted, by showing that it ought to be avoided for some ground specified in section 29, must show, in addition, that he had no knowledge, until

after the granting of the discharge, of the existence of the avoiding act or fact, clearly expresses the view of the law to be, that the creditor who has knowledge, before the discharge, of the existence of an act or fact which would prevent a discharge, may waive his right to enforce such act or fact, simply by his silence, when he might have spoken. If so, certainly, *a fortiori*, he may waive such right by affirmative acquiescence and ratification, such as these creditors have deliberately manifested in this case. The provisions of the 1st and 2d sections of the Act and its whole scope show that the proceedings under it, in the bankrupt case proper, are regarded as proceedings in Equity, and are to be governed by the rules and analogies of Equity jurisprudence. It follows, that these objecting creditors are estopped from urging these objections, and, as no other objection is seriously urged by them and no other creditor opposes, a discharge will be granted, when a certificate of conformity is furnished by the Register.

APRIL, 1869.

IN THE MATTER OF THE SOLDIERS' BUSINESS MESSENGER AND DISPATCH COMPANY, BANKRUPTS.

Recording Mortgage.—Property in Different States.

Where a mortgage of goods and chattels, made as security for a debt, in good faith and for a present consideration, within the 14th section of the bankruptcy Act, and not invalid as made in violation of any law of the State of New York, or of the United States, was duly executed, covering property partly in New York and partly in New Jersey, and was duly recorded in New York, but was not duly recorded in New Jersey:

Held, That, the property in New Jersey must be regarded as not embraced in it, but, that that fact did not affect its validity as regarded the New York property.

In the Matter of the Soldiers' Business Messenger and Dispatch Co., Bankrupts.

THIS was a question as to the payment by an assignee in bankruptcy of the amount of a mortgage upon certain personal property of the bankrupts. The validity of the mortgage was contested by the creditors.

James A. Seaman, for the assignee.

Strahan & Root, for the mortgagee.

C. F. Hill, for the general creditors.

BLATCHFORD, J. I think that the mortgage in question in this case is, within the 14th section of the bankruptcy Act, a mortgage of goods and chattels, made as security for a debt, in good faith and for a present consideration, and not invalid, as having been made in violation of any law of the State of New York or of the United States. I do not think, from the evidence, that the mortgagee, or the persons for whom he acted, had reasonable cause to believe that the mortgage was made with a view or intent to prevent the property of the mortgagors from coming to their assignee in bankruptcy, or from being distributed under the bankruptcy Act, or to defeat the object of, or in any way impair, hinder, defeat, impede or delay the operation and effect of, such Act, or to evade any of the provisions of such Act, or reasonable cause to believe, that a fraud on the Act was intended. Nor does the evidence establish that the mortgage was made with any such view or intent. The making of it was duly authorized by the Company and it was properly made. The only difficulty in the case is, that the mortgage was not duly recorded in New Jersey, according to the laws of that State, so as to make it operative, as against the creditors of the mortgagors, in respect to such of the mortgaged property as was, at the time of the delivery of the mortgage, situated in New Jersey. It was duly recorded in the proper office in the

city of New York, so as to make it operative, as against the creditors of the mortgagors, in respect to such of the mortgaged property as was, at the time of the delivery of the mortgage, situated in the city of New York. As respects such New Jersey property, the mortgage must be regarded as if such property were not embraced in it, But that fact does not affect its validity as regards such New York property.

The testimony and the report of the Register furnish no means by which to determine what portion of the property was, at the time of the delivery of the mortgage, situated in New York and what portion in New Jersey. Unless that question can be determined by agreement of the parties, or unless it be agreed that the nett proceeds in the hands of the assignee arising from such New York property are sufficient to pay the amount due on the mortgage, namely, $4,750, with interest, there must be a reference to the Register, to take testimony and report as to when the mortgage was delivered and as to what portions of the mortgaged property were severally in New York and New Jersey when the mortgage was delivered, and as to what are the nett proceeds in the hands of the assignee, resulting from the sales of such portions severally. The question of costs is reserved.

APRIL, 1869.

THE SCHOONER J. F. FARLAN.

SALVAGE BY CORPORATION.—PULLING VESSEL OFF THE ROMER SHOAL.—REASONABLE COMPENSATION.—COSTS.

Where a schooner was ashore on the Romer Shoal, and was pulled off in less than two hours' time, by a steam-tug owned by a corporation incorporated for wrecking purposes, which had heard of the situation of the schooner and sent

the tug down to her, and which claimed $3,000 salvage for the service, the schooner and her cargo being worth $23,000:

Held, That the libellants were entitled to reasonable compensation for the services rendered;

That the fact that the vessels of the corporation were maintained for wrecking and salvage purposes, at heavy expense, and were often unemployed, was inadmissible as a basis of fixing that compensation;

That $400 should be allowed to the libellants, and, as it had been offered to them and refused, the decree must be without costs.

THE libellants in this case were The New York Submarine Company, a corporation created by the laws of the State of New York, for the business of assisting and saving vessels wrecked and vessels in distress. The claim set up in the libel was for services rendered by the steamer Rescue, owned by the libellants, and by persons on board of that vessel, in the employ of the libellants, in towing the schooner J. F. Farlan, by means of a hawser, from off the Romer Shoal, in the lower bay of the port of New York, on the 4th of October, 1867. The libel propounded the claim as one of salvage. and demanded the sum of $3,000 for the service. The only service set up in the libel was, that the libellants, by means of the Rescue, put a wrecking crew on board of the schooner, and, at the request of her master, attached a line to her and hauled her off from the shoal, where she was aground. The circumstances relied on in the libel, as furnishing ground for demanding so large a compensation were, that the libellants maintained the Rescue and other vessels. and a large quantity of wrecking apparatus and material, and a large staff of skilled men, for the purpose of rendering assistance to vessels needing such assistance; that, if the schooner had not been pulled off when she was, she would have gone to pieces during the following night; that ineffectual attempts had been made, by two other steamers, to get her off, before the Rescue took hold of her; that the Rescue, a valuable vessel, and the valuable property on board of her, and her crew, were exposed to great hazard and peril in ren-

dering the service in question; and that the schooner was of the value of over $23,000. The answer set up, that the schooner was in no danger, and was making no water; that the service did not occupy over twenty minutes; that the libellants were not entitled to salvage, or to anything more than a reasonable compensation, which the claimants had offered to pay; and that the demand for $3,000 was exorbitant, unreasonable and unjust.

For libellants, *J. E. Parsons.*

For claimants, *E. H. Owen.*

BLATCHFORD, J. I regard it as determined, by the decision of the Circuit Court for this District, in the case of *The Morning Star*, (6 *Blatchf. C. C. R.*, 154,) that the rule applicable to claims for services rendered to vessels by incorporated companies, such as the libellants are, is to award a reasonable and liberal compensation for the use, in the particular service, of the apparatus employed, and for the skill with which it is handled—in other words, a reasonable and liberal compensation for the work and labor and the materials used—but that nothing can be awarded as a salvage compensation, on the principles which govern the Admiralty in awarding compensation for admitted salvage services, it being necessary to exclude all considerations of personal sacrifice or gallantry in encountering peril in rendering the service, and it being the fact, that the persons engaged in the service, and representing the corporation, are employed to render the service, at fixed wages, depending in no manner on the success of the service, and do not share in the compensation, as such, received for the service.

In this case, the libellants were not employed to send a vessel to take off the schooner, but learning, through

a telegraphic despatch from their agent at Sandy Hook, that the schooner was ashore on the Romer Shoal, they sent down the Rescue to see if assistance was needed. The Rescue reached the schooner between 11 A. M. and noon. The schooner was pulled off from the shoal by a quarter before 1 o'clock P. M. The whole service, therefore, so far as the schooner was concerned, occupied less than two hours of time. It was effective, and rendered with skill and judgment, but it was not attended with any extraordinary hazard or peril.

The sum of $3,000, as a proper compensation for this service, is sought to be maintained by the testimony of four witnesses for the libellants. One of them, Pierce, is the master of one of the wrecking schooners of the libellants. Another, Low, is a divers' attendant, in the employ of the libellants. Another, Samuels, was formerly President of the libellants, and is now President of the Atlantic Sub-marine Company, a corporation of a kindred character with the libellants. The fourth, Perry, is the general agent of the libellants. Pierce says that, under the circumstances, as the schooner was situated, he does not think $3,000 is out of the way; but, when asked how he makes up that sum, he says he does so because they might have been four or five days getting the schooner off, and that, if they got her off sooner, so much the better. Low fixes the sum of $3,000, in view of the number of vessels and force of men which the libellants keep up. Samuels fixes that sum, in view of the fact that the vessels and men of the libellants are often unemployed for a time, that their force of sixty men have high wages and constant pay, and that they keep on hand for their business a large amount of material. Perry fixes that sum on the idea that the libellants keep up their stock and men, which may have to lie for a month doing nothing. It is hardly necessary to say, that the basis of compensation assumed by the witnesses Low, Samuels and Perry, is wholly inadmissible in law.

It amounts to this, that this schooner is to pay, not for the service rendered to her, not for the work and labor and materials used in such service, not for the skill with which the apparatus used in pulling her off from the shoal was employed, but for the fact that other vessels do not ground on the Romer Shoal, and, therefore, do not require to be hauled off from it by the libellants, and that the weather is not always stormy, and that wrecks are an exception and not a rule. The universal rule of trade is, that the price or value of an article is enhanced when the supply is not equal to the demand. But this rule is sought to be reversed in this case, and the price is sought to be enhanced, because the supply is greater than the demand. The proposition need only be stated to carry with it its own refutation. As the basis on which these witnesses for the libellants fix this sum of $3,000 wholly fails, their evidence must be wholly disregarded. So, too, the idea of the witness, Pierce, that the schooner must pay the $3,000, because the libellants might have been four or five days in earning the $3,000, is equally inadmissible.

It is shown that the master of the schooner offered to the libellants $400 for the service, and that they refused it. Two witnesses for the claimants, who have been in the tow-boating business, with steam-tugs, for many years, and are familiar with cases similar to the case of this schooner, testify that $300 would be a reasonable price for this service.

Under the circumstances, I award to the libellants $400, without costs.*

* The decree in this case was affirmed by the Circuit Court, on appeal, in February, 1871, on the facts, although the principle of the case of the Morning Star was overruled by the Supreme Court, in the case of the Camanche, (8 Wall. 484). R. D. B.

APRIL, 1869.

IN THE MATTER OF LODER BROTHERS, BANKRUPTS.

Register's Fees as Assignee.

Where bankrupts surrendered their property to a Register, and thereafter, by order of the bankruptcy Court, custodians were appointed and were directed to sell certain goods at retail, paying over the proceeds to the Register daily, which was done during twenty-five days, in which time $15,000 was so received by the Register:

Held, That, the Register was entitled to be paid $5 a day, under section 47 of the bankruptcy Act, and the percentage on the $15,000 allowed to assignees by section 28.

In this case, a Register in bankruptcy applied to the Court, on petition, stating that, the bankrupts having surrendered all their property to him, on his application two custodians were appointed to take possession of and sell certain goods at retail, paying over to him all proceeds of sales; that the custodians had, during twenty-five days, paid over to him $15,000, which he had deposited, from time to time; and that he had drawn checks for the payment of expenses and otherwise for the carrying on of the business. On this petition the Register applied to the Court to fix his compensation.

Blatchford, J. I allow to the Register, in the above matter, a compensation of $5 per day, for the twenty-five days, under section 47, for his employment under the special order, as custodian of the surrendered property, as Register. As a further compensation, in respect of the $15,000 realized by him from the sales of goods, I allow to him, for the custody of that money, $250, that sum being arrived at by computing, on the $15,000, the

rate of percentage allowed to assignees by section 28, on moneys received and paid out by them. An order will be entered accordingly, the whole sum, $375, to be payable out of the assets of the estate.

APRIL, 1869.

IN THE MATTER OF WILLIAM BILLING, A BANKRUPT.

Construction of Statutes.—Fifty Per. Cent Clause.

A statute will not be construed as being retroactive, unless the intention that it shall be so appears on its face.

When such intention appears, the statute will be allowed to act retroactively unless some vested right will be impaired, or some contract will be violated thereby.

The second clause of the 33d section of the bankruptcy Act provided, that, "in all proceedings in bankruptcy commenced after one year from the time this Act shall go into operation, no discharge shall be granted to a debtor whose assets do not pay fifty *per centum* of the claims against his estate, unless the assent in writing of a majority in number and value of his creditors who have proved their claims is filed in the case at or before the time of application for discharge." The year expired on June 1st, 1868. On July 27th, 1868, an Act was passed declaring that the second clause of the 33d section above mentioned "shall not apply to the cases of proceedings in bankruptcy commenced prior to the first day of January, 1869," &c., &c., (15 *Stat. at Large*, 227:)

Held, That, the provisions of this latter Act extended to proceedings in bankruptcy commenced between June 1st, 1868, and July 27th, 1868, as well as to proceedings commenced on and after July 27th, 1868.

Blatchford, J. This is a case of voluntary bankruptcy. The petition was filed on the 8th of June, 1868. The proceedings have progressed in due course and the petitioner has applied for a discharge. His assets have not paid and will not pay fifty *per centum* of the claims against his estate, and the assent in writing of a majority in number and value of his creditors who have proved

their claims has not been filed. On this state of facts, the question arises, whether he is entitled to a discharge. On the 8th of June, 1868, when his petition was filed, the period of one year from the time the bankruptcy Act went into operation had expired. The expiration of that period brought into effect the provision of the second clause of the 33d section of the Act, which is this: "In all proceedings in bankruptcy commenced after one year from the time this Act shall go into operation, no discharge shall be granted to a debtor whose assets do not pay fifty *per centum* of the claims against his estate, unless the assent in writing of a majority in number and value of his creditors who have proved their claims is filed in the case at or before the time of application for discharge." By the 50th section of the Act, no proceeding under the Act could be commenced until the 1st day of June, 1867. The Act, therefore, so far as the second clause of the 33d section is concerned, went into operation on the 1st day of June, 1867, and that clause took effect in respect to all proceedings in bankruptcy commenced after the 1st day of June, 1868. The filing of the petition in the present case, on the 8th of June, 1868, followed as it was by an order of adjudication, was, under section 38, the commencement of proceedings in the case. Therefore, if the second clause of the 33d section had remained unaltered, it is manifest that no discharge could be granted in this case. But, by the Act of July 27th, 1868, (15 *U. S. Stat. at Large*, 227,) it is declared that the provisions of the second clause of the 33d section of the bankruptcy Act "shall not apply to the cases of proceedings in bankruptcy commenced prior to the first day of January, eighteen hundred and sixty-nine," and that "the time during which the operation of the provisions of said clause is postponed shall be extended until said first day of January, eighteen hundred and sixty-nine," and that said clause is so amended as to read as follows: "In all proceedings in bankruptcy

commenced after the first day of January, eighteen hundred and sixty-nine, no discharge shall be granted to a debtor whose assets shall not be equal to fifty *per centum* of the claims proved against his estate, upon which he shall be liable as the principal debtor, unless the assent in writing of a majority in number and value of his creditors to whom he shall have become liable as principal debtor, and who shall have proved their claims, be filed in the case at or before the time of the hearing of the application for discharge."

The question which arises on this legislation is, whether the Act of July 27th, 1868, in saying that the provisions of the second clause of the 33d section of the original Act should not apply to the cases of proceedings in bankruptcy commenced prior to the 1st of January, 1869, meant only proceedings which should be commenced after the 27th of July, 1868, and prior to the 1st of January, 1869, or meant proceedings which had been commenced before the 27th of July, 1868, as well as proceedings which should be commenced on and after that day; and whether the extension of the time during which the operation of the provisions of such second clause was postponed, was an extension to commence only on the 27th of July, 1868, or an extension to commence retroactively on the 2d of June, 1868; and whether such second clause of the 33d section, in its amended form, is to be regarded as being in force only from the 27th of July, 1868. In other words, the question is, whether the provisions of the Act of July 27th, 1868 were wholly prospective, or whether they were also retroactive, so as to prevent the coming into operation until after the 1st of January, 1869, of such second clause of the 33d section.

The general rule is, that a statute will not be construed as being retroactive in its operation, unless the intention that it shall be so retroactive appears on its face, and that, when such intention appears, the

statute will be allowed to operate retroactively unless some vested right will be impaired or some contract will be violated. It is the fair import of the legislation referred to, that Congress intended to give to all debtors in whose cases proceedings in bankruptcy had been commenced or should be commenced on or before the 1st of January, 1869, the privilege of obtaining a discharge without any restriction as to the per centage which their assets should pay, or as to the procuring of the assent in writing of any of their creditors. The provisions for a discharge, in the Act, are remedial and beneficent, and no reason can be assigned why Congress should remove such restriction in the cases of proceedings commenced on and after the 27th of July, 1868, and not remove it in the cases of proceedings commenced before that day and after the 1st of June, 1868. There were in this District eighteen cases commenced after the 1st of June, 1868, and before the 27th of July, 1868. On a view of all the provisions of law, it must be held, that Congress has expressly manifested its intention to make no discrimination against those cases. This question has been submitted to Mr. Justice Nelson and he concurs in the views here expressed. A discharge will, therefore, be granted.

Benedict and Boardman, for the bankrupts.

APRIL, 1869.

THE STEAMSHIP PENNSYLVANIA.

Collision in New York Harbor.—Vessel in Tow and Steamship.—Failure to Keep Course.

Boats in tow, and exclusively under the control of a steam-tug, are, as respects other vessels, to be considered vessels under steam.

Where a steamboat, having fourteen boats in tow, was coming up the Hudson

River on a flood tide, and saw a steamship ahead, and about 2,000 feet off, coming down the river, presenting the bluff of her starboard bow, and blew two whistles as a signal to her to pass to her own left, and received no answer, and soon, seeing that the steamship had ported her helm, the steamboat, without altering her own helm, stopped, and reversed her engine, the effect of which, in the flood tide, was to cause the rear boats to spread out, so that they were thrown across the course of the steamship, which would otherwise have cleared them, but which struck the rear boat on the port side of the tow:

Held, That if the steamship was seen directly ahead of the steamboat, and presenting the bluff of her starboard bow, as claimed by the steamboat, the vessels would have passed clear, if both had kept on, and that Article 14 of the Rules for avoiding collisions was, therefore, on that theory, not applicable to the case;

That if it were, it was also the duty of the steamboat, under Article 18, to keep her course, and, that, having allowed her tow to spread out across the track of the steamship, she did not, in the sense of the statute, keep her course, and was negligent in so doing;

That the spreading out of the tow by the tide, was a necessary effect of her stopping, and was a special circumstance requiring a departure from Article 16, if that Article would otherwise have been applicable;

That under Article 20, the steamboat was liable for neglecting the precaution of keeping on without stopping.

That the steamship, having made the tow a little on her port bow, and having ported her helm, and having slackened her speed, and stopped and backed as soon as she saw, by the stopping of the steamboat, and the spreading out of her tow, that there was risk of collision, was not in fault.

BLATCHFORD, J. These are five libels filed to recover the damages caused by a collision, which took place in the harbor of New York, in the Hudson river, off the foot of Courtlandt street, in the city of New York, on the morning of the 24th of October, 1867, just before sunrise, between the steamship Pennsylvania, which had left her dock, in said city, and was bound on a voyage to sea, and three boats, called "chunkers," loaded with coal, and in tow of the steamer Princeton. The Princeton was on her way up the Hudson river, having come from Amboy, New Jersey, with fourteen boats in tow, two being on each side of her, one directly behind each of those four, and six more in a third tier behind the second four, such six being arranged so that three of them were on the left, in the second tier behind the two on the port

side of the Princeton, and three of them were on the right, in the second tier behind the two on the starboard side of the Princeton, with an interval between the port three and the starboard three. These suits relate to the port three, and their cargoes, which were damaged by the collision. The Pennsylvania struck the extreme port boat of such port three.

The case on the part of the libellants is, that the Princeton saw the Pennsylvania ahead, about 2,000 feet off, presenting to the Princeton the bluff of her starboard bow; that the Princeton, when the Pennsylvania was at that distance off, blew two blasts of her steam whistle, as a signal to the Pennsylvania to pass to her own left, or between the Princeton and the New York shore; that the Princeton, receiving no answer to her whistle, and observing, when the Pennsylvania was about fifteen hundred feet distant, that the Pennsylvania had ported her helm, and was coming straight towards the Princeton, so as to involve risk of collision, stopped and reversed her engine, and did not alter her helm; that the checking of her headway caused the port three boats, in her hindmost tier, to spread out more to port, by means of the tide, which was flood, while she and her tow were being swept up the river by such tide; and that the Pennsylvania passed in safety to the westward of the two boats on the port side of the Princeton, and of the boats in the first tier behind, but struck the port side of the extreme port boat of the hindmost tier. The libellants claim, in the first place, that this case is to be governed by the regulations prescribed by Article 14 of the steering and sailing Rules contained in the Act of April 29th, 1864, (13 *U. S. Stat. at Large*, 50 ;) and that, as the two steamers were, when the Princeton first saw the Pennsylvania, crossing, so as to involve risk of collision, and as the Pennsylvania then had the Princeton on her own starboard side, it was the duty of the Pennsylvania to keep out of the way of the Princeton and

her tow. The answer to this is, that the two vessels were not crossing so as to involve risk of collision, because it is expressly contended by the Princeton, and the fact is so, that if the Pennsylvania was in the position alleged by the Princeton, directly ahead of the Princeton, and 2,000 feet off, and presented the bluff of her starboard bow to the Princeton, the two vessels, if both of them had kept on their respective courses, would have passed clear of each other. Besides, if it was the duty of the Pennsylvania, by Article 14, to keep out of the way of the Princeton and her tow, it was also the duty of the Princeton, by Article 18, to keep her course. I am satisfied that this collision happened entirely from the fault of the Princeton in stopping where she did, and suffering her boats to spread out by the force of the tide. That was gross negligence. But for that, the Pennsylvania would have passed the hindmost tier in safety, as she did the rest of the boats. The boats in tow are to be considered as boats under steam, because towed by, and exclusively under the control of, the tug. The Princeton, in suffering the tows to spread out, and change their course, and lie, as Riley, one of the hands on the Princeton, and one of the witnesses for the libellants, expresses it, right across the track, did not, in the sense of the statute, keep her course. She should, at least, have refrained from this manœuvre, with a flood tide, which she must have known would produce the very effect it did. She had no power, by whistling, to compel the Pennsylvania to pass to the eastward. Even if she was not obliged, in compliance with Article 13, to put her helm to port, when she saw that the Pennsylvania had ported, and was meeting her end on, so as to involve risk of collision, yet she had no right, in reliance on Article 16, under the circumstances, to stop and reverse. By Article 19, in construing the Rules, due regard must be had to special circumstances which exist, in any particular case, rendering a departure from any Rules

necessary, in order to avoid immediate danger; and, by Article 20, nothing in the Rules is to exonerate a vessel from the consequences of the neglect of any precaution required by the ordinary practice of seamen, or by the special circumstances of the case. In this case, an adherence to Rule 16, by stopping and reversing, on the part of the Princeton, was sure to bring with it, in the flood tide, immediate danger, by spreading out the tow across the track of the Pennsylvania, and a departure from that Rule was necessary to avoid such danger; and the collision was the plain consequence of the neglect by the Princeton of the precaution, which the special circumstances of the case, and the ordinary practice of every intelligent seaman required, of not stopping and reversing, when going with the tide, and thus suffering the boats in tow to spread out, and get into the way of the Pennsylvania.

I see no fault on the part of the Pennsylvania. She slackened her speed, and stopped, and reversed, as soon as she perceived, by the stoppage of the Princeton, and the spreading out of her tow, that there was any risk of collision with any part of the tow. She could not have apprehended any such negligent action on the part of the Princeton. The fact that she passed every thing in safety, except these three port tows, which were in the act of being spread out by the tide through a stoppage by the Princeton, which could not have been anticipated, shows that the collision was wholly due to such action of the Princeton. I think, on the evidence, that the Pennsylvania made the Princeton a little on the port bow of the Pennsylvania, and that, from that moment, in accordance with Article 13, the Pennsylvania put and kept her helm to port until the collision, and that she would have cleared the Princeton and the whole of her tow, if the Princeton had not negligently thrown her tow, in the manner already stated, across the track of the Pennsylvania. When too late, the Princeton became

aware of the danger in which she had involved her tow, and started ahead, with a view of dragging the boats out of the way of the Pennsylvania, but there was not time to effect the object.

The libels must be dismissed, with costs.

James Ridgway, *Max Goepp*, *Julius Bissell* and *Francis C. Bowman*, for the libellants.

John Chetwood and *Charles Donohue*, for the claimants.

APRIL, 1869.

FOUR CUTTING MACHINES, &c., &c., AT 206 AND 208 FULTON STREET.

INFORMER.—INTERNAL REVENUE ACTS.—GOVERNMENT OFFICER.

Where an inspector of internal revenue at Philadelphia, appointed under the fifth section of the Act of June 30th, 1864, made researches there as to sales of tobacco made by merchants at New York to customers in Philadelphia, which researches were embraced within his duties as such inspector, and were discharged in co-operation with, and under the direction of, officers of the Internal Revenue at New York: *Held*, That information so obtained by him never became, as against the United States, his private property, so as to allow him any discretion as to withholding it from his superior officers, and that he was not entitled to share as informer in forfeitures resulting from violations of the Internal Revenue Law which he thus discovered, and of which he gave information.

BLATCHFORD, J. In this case, an order of reference was made to a Commissioner, in August, 1868, to ascertain and report who is the informer in this case, entitled to share, as such, in the sum of $21,558.44, now in the registry of this Court for distribution. The contest has proceeded before the Commissioner between one Mich-

ener and one Payne, and a large mass of testimony has been taken before him on the part of those parties respectively, each of them claiming, as against the other, that he is entitled as informer. The United States do not seem, by the minutes of testimony taken by the Commissioner, to have been represented before him on the reference, and the witnesses produced by each claimant were cross-examined only on the part of the other claimant, and not on the part of the United States. It was, therefore, very naturally and properly assumed by the Commissioner, that the United States regarded the one or the other of the claimants, at all events, as entitled to share, as informer, in the funds, and that his duty was limited to the inquiry, as matter of fact, into the question as to who, within the language of the 179th section of the Act of June 30th, 1864, (13 *U. S. Stat. at Large*, 305,) as amended by the 9th section of the Act of July 13th, 1866, (14 *Id.*, 145,) first informed of the cause, matter or thing whereby the forfeiture in this case was incurred. That forfeiture is one incurred under the Internal Revenue Acts of the United States. The Commissioner has reported that Michener was the sole informer in this case. Payne has filed five exceptions to this report: (1.) Because Michener is found to be the sole informer; (2.) Because Michener is found to be an informer; (3.) Because Payne is not found to be the informer; (4.) Because Payne is not found to be the sole informer; (5.) Because certain testimony offered by Payne before the Commissioner was excluded by him. The questions arising on these exceptions have been argued before the court by the counsel for Michener and Payne respectively, the United States not being represented. The counsel for Payne, however, in fact argued on the part of the United States, by contending, that, independently of the question of Payne's rights as informer, Michener could not, in any event, share as informer, even though he should be found to be, as matter

of fact, the person who, within the 179th section of the Act of 1864, first informed of the cause, matter or thing whereby the forfeiture was incurred.

I have examined the evidence in this case with care, and am of opinion that Payne was not the person who, within the 179th section, first informed of the cause, matter or thing whereby the forfeiture in this case was incurred; and that Michener was the person, and the only person, who, as against Payne and all other persons, except the United States, first informed of such cause, matter or thing. I also think that the Commissioner properly excluded the evidence named in the fifth exception. As respects Payne, therefore, and the exceptions taken by him, all of them are disallowed. But I think that Michener, although in fact the first informer, as against Payne and all other persons, is not entitled, as informer, to any share in the moneys to be distributed in this case. If I were inclined to a different opinion, I should, under the circumstances of this case, give an opportunity to the United States to be heard on the question, through their attorney, but that now becomes unnecessary.

It appears, that, during the whole period covered by the acts of Michener, on which he relies as constituting him informer, he was a revenue inspector at Philadelphia, appointed by the Secretary of the Treasury under the authority of the 5th section of the Act of June 30th, 1864; and that it was a part of his official duty to make the investigations and do the acts on which he relies. The property seized was forfeited and condemned for violations of the Internal Revenue laws, committed in New York by the firm of Alexander Ross & Co., in the manufacture and sale of tobacco. The researches and investigations made by Michener at Philadelphia, which place was his post of duty, were in reference to sales of articles made of tobacco by Ross & Co. to customers of theirs at Philadelphia. Such duties were discharged by

Michener in co-operation with, and under the direction of, officers of the Internal Revenue at New York. The duties of an inspector, as defined by the 5th section of the Act of June 30th, 1864, are, the "proper enforcement of the Internal Revenue laws" and the "detection of frauds." The duties performed by Michener in this case were strictly duties of that character. The same section confers on an inspector the power of examining persons, books and premises, as may be necessary in the discharge of the duties of his office. In the present case, he examined and investigated in Philadelphia, to detect frauds committed by tobacco manufacturers in New York. But that was as much a part of his official duty as if the manufacturers had carried on their manufactory and committed the frauds in Philadelphia, and in the assessment district in and for which Michener was appointed. In discharging duties of this character, the whole time and services of Michener belonged to the United States, for the per diem compensation fixed by the said 5th section. All information acquired by Michener in the discharge of those duties, became, *ipso facto*, the property of the United States. Such information never became, as against the United States, the private property of Michener, so as to allow to him any discretion as to communicating it to or withholding it from his superior officers. That is the test. Information possessed by a private individual, holding no official relation to the United States, and bound by no official duty to disclose such information to his superiors, may be withheld or disclosed by him, as he elects. If he is the first to disclose it, he may become an informer under the law. But a person whose duty it is to disclose information, and who violates such duty if he does not disclose it, cannot be an informer. The information is, in judgment of law, disclosed to the United States, by being possessed by him as an officer of the United States charged with the duty of procuring the information, the moment

he obtains the information. Undoubtedly, Congress may, if they choose, award to an officer, under such circumstances, a share, as informer, in the proceeds of forfeitures; and if the language of the 179th section of the Act of 1864 were such as to require or admit, in its proper construction, the including of Michener in its description of informers, I should so hold. But the language of that section is, that the informer's share is to be to the use of the person who shall first inform of the cause, matter or thing whereby the fine, penalty or forfeiture has been incurred. Who is to be first informed? The statute is silent. But it must necessarily mean, that the person to be first informed is a person whose duty it is, on behalf of the United States, to receive the information and impart it to his superior officers. That was, in this case, the duty of Michener. But it was equally his duty to procure and impart the information; and he cannot be treated as an informer, for having ascertained the facts in question and imparted them to himself. Nor can he be treated as an informer because he imparted them to another or a superior officer; because, if, in this case, any other person besides Michener himself be regarded as the proper person to be first informed, so as to give to the communicator of the information the position of informer under the statute, we cannot stop short of the highest officer, the Secretary of the Treasury or the President, as the only proper recipient of the information, and the person who first informed such highest officer would be entitled as informer. Under the 91st section of the Act of March 2d, 1799, (1 *U. S. Stat. at Large*, 697,) the informer is required to be a person who gives to a collector information in pursuance of which a fine, penalty or forfeiture is recovered, and may be any person other than the naval officer or surveyor of the District. Under that section, it was very properly held, by Judge Ware, in the District Court for Maine, (*Hooper* v. 51 *Casks of Brandy*, *Davies' R.*, 370,) that an

inspector of the customs could be an informer. But, under that Act, the information was required to be given to the collector. If that language had not been used in that Act, it would have been difficult for the Court to say, as it did, that Congress had offered to the inspectors an additional compensation beyond their regular stipend, and that they came within the words of the Act. Under the 179th section of the Act of 1864, the words "first inform," in order to warrant the treating of Michener as an informer, in this case, must be read as if they were written "first learn," or "first ascertain." But that is not the language. The import of the words "first inform" is, that the information is to be imparted by one person to another and a different person; that the latter person is to be one whose official duty it is to act on such information by imparting it to his superior officers, or otherwise; that he cannot obtain such information in the course of the discharge of his official duty, and impart it to himself, so as to make himself an informer under the law; and that the person who is to impart the information, so as to be informer, must be a person who has imposed upon him no official duty to impart the information. There is no principle which would put Michener in the position of informer, in this case, for what he did, which would not also require the Court to regard Mr. Harvey, the inspector in New York, who received the information from Michener, as an informer in the case, because he was the first to inform Collector Bailey, who seized the property; and it would be difficult to say that Mr. Harvey and Michener would not, each of them, be entitled to the same share as the other. These views are substantially those held by Judge Lowell, in the District Court for Massachusetts, in the case of *United States* v. 100 *Barrels Distilled Spirits*, (8 *Internal Revenue Record*, 20.)

There must, therefore, be a distribution of the money

in Court in this case, without any reference to the claims of either Payne or Michener, as informer.

A. J. Vanderpoel, for Payne.

B. K. Phelps, for Michener.

APRIL, 1869.

IN THE MATTER OF THE PEOPLE'S MAIL STEAMSHIP COMPANY, BANKRUPTS.

Lien on Bankrupt's Property.—Collision.

Where the marshal had taken possession, under an order of the bankruptcy Court, of the property of a bankrupt, including a steamship, and, after the assignee in bankruptcy was appointed, delivered over the keys of the vessel to the assignee, and remained in charge of her on behalf of the assignee, and thereafter a libel was filed against the vessel, to recover damages for a collision which occurred before the adjudication in bankruptcy, on which libel process was issued to the marshal:

Held, That the libellants must be enjoined from attempting to hold the vessel, or interfering with her in the hands of the assignee.

That, if the libellants had a prior lien on the vessel, it must be enforced by being submitted to the arbitrament of the bankruptcy Court.

Blatchford, J. In this case, the bankrupts were declared such on the 23d of January, 1869. An assignee was chosen on the 20th of February, 1869. The marshal of this District, under an order made by this Court, on the 16th of January, 1869, under the 40th section of the bankruptcy Act, took possession provisionally, on or about that day, of all the property of the bankrupts, including the steamship Emily B. Souder. On or immediately after the 20th of February, 1869, the deputy marshal who was in charge of that vessel gave up the keys of it, by direction of the marshal, to the assignee, and thereafter remained in charge of the vessel on

behalf of the assignee. On the 3d of March, 1869, Joseph West and Thomas Nettleton filed a libel *in rem* in this Court, in Admiralty, against the said vessel, claiming $1,405.28 damages for a collision which occurred between her and the steamer Beaufort, on the Mississippi river, on the 27th of June, 1868. On this libel a monition was issued to the marshal, on the 3d of March, 1869, returnable on the 23d of the same month, commanding him to attach the vessel. To that monition the marshal made return, that he, on the 3d of March, attached the vessel. The assignee now, on a petition setting forth these facts, and his possession of the vessel prior to such attachment of her in the collision suit, prays for an injunction restraining the libellants in such suit from holding or attempting to hold the vessel, or doing any other act interfering with the property of the bankrupts in the hands of the assignee.

This injunction must be granted. The possession of the vessel by the assignee is the possession of her by the court. That possession cannot be lawfully disturbed or ousted by any person. If the libellants in the collision suit have a lien on the vessel, created by the fact of the collision, which is entitled to be satisfied out of the vessel, in preference to the claims of creditors under the bankrupt proceedings, that lien, inasmuch as proceedings to enforce it were not commenced before this court took possession of the vessel for administration in those proceedings, can be enforced, so long as this court holds possession of the vessel, only by being submitted, by those claiming it, to the arbitrament of this Court sitting in bankruptcy. (*Harlan* v. *The Nassau*, *Blatchford's Prize Cases*, 199, 220; *The Nassau*, 4 *Wallace*, 634, 642.) If the libellants have, by virtue of the collision, or otherwise, a lien on the vessel, this court, sitting in bankruptcy, has full power, under section 1 of the bankruptcy Act, to ascertain and liquidate such

lien, on its being presented in proper form, by petition, to this court sitting in bankruptcy.

The prayer of the petition is granted.

Beebe, Donohue & Cooke, for the assignee.

Foster & Thomson, for West and Nettleton.

Eastern District of New York,

APRIL, 1869.

THE STEAMBOAT THOMAS KILEY.

DAMAGES BY COLLISION.—EXCEPTIONS.—DEMURRAGE.—PRIVATE SALE OF CARGO.

Where a canal-boat, laden with coal, was sunk by a collision in the port of New York, and, after she was raised, her cargo was taken out and sold at private sale, without notice to the parties to be charged for the damages; and the boat was then taken to Elizabethport, N. J., to be repaired, where she was frozen in, so that she could not be repaired for over a month, and no sufficient reason was shown for taking her from New York to be repaired, and the Commissioner, to whom it was referred to ascertain the damage, allowed demurrage for the whole time, and also an item of loss on the coal, and the claimants excepted to this report:

Held, That the owners of the boat could not recover demurrage for all the time of the delay, but only for a period of time sufficient to complete the repairs, under ordinary circumstances;

That the damage to the coal should have been ascertained by an appraisal, or by a sale upon notice; but, as it appeared that the cargo was, in fact, damaged, and that a sale at auction would probably have shown as much loss as was allowed, the Court allowed the item to stand, marking its disapproval of the course pursued, by casting on the libellant the fees of witnesses called to prove that item.

THIS case came up upon exceptions to the Commissioner's report. The action was brought to recover the damages occasioned to the libellants by the sinking of a

canal-boat, laden with coal, in a collision, which occurred on the 17th of January, 1867, in the port of New York. It appeared that the vessel, with the coal on board, was raised on the 22d of January, and taken to the Atlantic Docks. The coal was then taken out, and sold at private sale, the discharging occupying 2½ days. The boat was then taken to Elizabethport, New Jersey, to be repaired, and almost immediately, on her arrival there, she was frozen in, so that she could not be put upon the ways until the 8th of March, when she was hauled out, and the repairs to her completed.

The Commissioner allowed the libellants demurrage, at the rate of $7 per day, for the whole period of 47⅓ days, to which allowance exception is taken.

The Commissioner also allowed $1.50 per ton for depreciation of the coal, by reason of the damages caused by the mud and water, to which exception was also taken.

BENEDICT, J. As to the question of demurrage, I am of the opinion that the libellants are not entitled to recover demurrage for the period of detention caused by the fact that the boat was frozen in at Elizabethport, where she went to repair.

The collision occurred in the port of New York, where, as the evidence shows, the repairs could have been effected promptly, and without any risk of freezing up. It is not shown that the repairs could have been done more cheaply at Elizabethport than in New York, nor does it appear that that was the home port of the vessel, nor is any reason whatever suggested by the evidence for taking the boat to Elizabethport.

The taking of the boat, without any sufficient reason, to a port where she was in danger of being frozen up, and where she was, in fact, frozen up immediately upon her arrival, was an error on the part of the master of the canal-boat, for the consequences of which he alone is

responsible. He cannot charge the respondents with a loss which the exercise of ordinary prudence on his part would have avoided.

The report must, therefore, be modified, by reducing the demurrage to a period of time sufficient to complete the repairs under ordinary circumstances. Any extra expense for taking the boat to Elizabethport must, for the same reason, be disallowed.

The next objection is to the allowance of $1.50 per ton, as the damage to the cargo of coal by mud and water. It appears that the damage was never appraised, and the coal was sold at private sale, in its damaged condition, without notice to the respondents, who were to be held responsible for the loss.

I disapprove of this mode of procedure. The damage to the coal should have been ascertained by a proper examination and appraisal, or by a sale upon notice to the respondents, or in some other way not open to the suspicions always attaching to a private sale of damaged property without notice. The allowance for this damage to the coal I permit to stand, simply because it appears affirmatively that the coal was wet and muddy, and I am of the opinion, looking at the whole evidence, that a sale at auction, on notice, would probably have shown as much loss as has been allowed; but I shall mark my disapproval of the course pursued, by casting upon the libellants the fees of the witnesses called to show the loss upon the coal. Had the coal been sold on notice, the necessity of any witnesses would probably have been avoided.

If the amount to be decreed in accordance with this opinion is not agreed upon, let the case be sent to the Commissioner, to reform the report in the particulars referred to.

APRIL, 1869.

IN THE MATTER OF JULIUS SCHWAB, A BANKRUPT.

INVOLUNTARY BANKRUPTCY.—EXPENSES OF CREDITORS.—REFERENCE.

Where several suits had been commenced in a State Court against S., in which attachments had been issued and levied upon his property, and thereupon another creditor filed a petition in the Bankruptcy Court, procured a warrant to the marshal, and procured injunctions staying proceedings in the State Court suits, and thereupon S. was adjudged a bankrupt without opposition, and the property was secured by the assignee:

Held, That the reasonable expenses of the creditors for such proceedings ought to be paid out of the fund, and that authority for the Court to direct such payment was to be found in the 1st section of the bankruptcy Act.

That a reference would ordinarily be ordered to ascertain the proper amount of such expenses.

THIS was an application on the part of the petitioning creditors, in a case of involuntary bankruptcy, for an order directing the assignee to pay to them out of the assets the amount of their reasonable expenses incurred in procuring the adjudication of bankruptcy, and preventing the disposition of the property by proceedings in the State tribunals before the appointment of an assignee in bankruptcy.

The petitioners filed their petition and procured a warrant to the marshal, and prior to the adjudication and to the appointment of the assignee, procured injunctions staying the proceedings in six actions brought against the bankrupt in the State Courts, in which attachments had been issued, and levied upon the property of the bankrupt. The result of this action on the part of the petitioners was an adjudication of bankruptcy without opposition, and the securing for equal distribution of property valued at some thousands of

dollars, which the assignee reduced to possession, and was about to distribute.

The petitioning creditors now asked to be paid out of the assets their reasonable expenses of the proceedings taken by them.

BENEDICT, J. As to the justice of this application there can be no question. The action of the petitioners was necessary to be taken by some one to recover for all the creditors the property which is now about to be distributed. The fund is the fruit of their diligence, and there can be no justice in compelling them to bear alone the expenses which were incurred for the benefit of all. The only question in my mind is, therefore, whether there exists any power in the Court to direct the assignee to pay these expenses—and upon consideration I am satisfied that authority for the exercise of such a power is to be found in the 1st section of the bankruptcy Act.

The due distribution of the assets of the bankrupt, for which the 1st section provides, cannot be made without the exercise of this power, for the petitioning creditors cannot be said to share equally with the other creditors if they must pay the expenses of the proceedings out of their dividend, and a distribution of the fund without providing for expenses like those in question, would work injustice.

These and other obvious considerations, which are referred to in the opinions of Judge Lowell, *In re Waite* (2 *Bank. Reg.* 146.) of Judge Bryan *In re Williams*, (2 *Bank. Reg.* 28,) seem to me abundantly to justify the construction of the Bankrupt Act which was given by these judges, and is now contended for by the petitioners.

In regard to the effect of the fee-bill of 1853, I may add to the cases cited in the opinions referred to, that I recollect a case in Admiralty where Judge Betts, since the passage of that Act, allowed a counsel fee, out of the

proceeds of a vessel, for an argument made for the common benefit of various parties, who had filed libels against the vessel, as against the claim of a mortgagee who was proceeding against the fund. (*Shannon* v. *The Ship Angelique.*)

The motion is accordingly granted. A reference would, ordinarily, be directed to ascertain the proper amount, but that is unnecessary in the present case, as the amount asked for is small, and the papers show fully the proceedings.

Southern District of New York,

MAY, 1869.

IN THE MATTER OF ROBERT W. BEATTY, JOHN C. BEATTY, AND GEORGE R. BEATTY, BANKRUPTS.

DISCHARGE.—LOSSES IN SPECULATION.

Where bankrupts appeared to have lost, in twenty-one months, a capital of $120,000, and were left with debts to the amount of $200,000, and it appeared that they had trusted their business almost exclusively to an uncle, in whom they had confidence, and who was able to make them believe that they were making large profits in buying and selling ships, and who, by this means, cheated them, leaving them with a claim against him of $640,000, on which nothing could be realized:

Held, That, on all the facts, it sufficiently appeared that the bankrupts had not been in any complicity with their uncle, in defrauding their creditors, but had been themselves defrauded, and that discharges would be granted to them.

BLATCHFORD, J. I have examined, with care, the voluminous testimony and exhibits in this case, with the assistance of the briefs furnished by the respective counsel. The bankrupts have, in my judgment, made a full and correct exhibition of all their dealings, and,

although their books, as kept by them during the time they were in business, which was before the passage of the bankruptcy Act, were not kept in the form which the most correct system of book-keeping would sanction, yet entries are found therein covering, with minuteness of detail, all their transactions, so that those transactions have all been laid bare by reference to the books. I cannot see any evidence of an intention to mislead or deceive any one by the manner in which the books were kept. Their transactions with their uncle, Thomas H. Armstrong, whereby all the capital, $120,000, which they put into their firm, and all the profits they made and realized from their legitimate business of dealing in teas, and all the money they borrowed from other parties, was wasted and lost in the short space of twenty-one months, leaving them insolvent, with an indebtedness due by them of over $200,000, and with scarcely any property, except a claim against Armstrong for over $640,000, sufficiently explain why they were ruined. I see, in these transactions, a haste to be rich by illegitimate means, and a greed of gain, on the side of the bankrupts, which, favored by the relationship of Armstrong to them, led them to trust him with all the money and obligations he asked for, on such representations as he chose to make, without any investigation by them, or any attempt to verify the truth of his statements; and, on the part of Armstrong, one of the most formidable and successful swindles of the time. But I see no complicity in fraud between Armstrong and the bankrupts. Armstrong was engaged all the time, knowingly, in cheating the bankrupts, and they were engaged all the time, negligently, but unknowingly, in aiding him to cheat themselves. The effect of the transactions was to deprive them of all means of paying their creditors; but I see no evidence of any fraud on their part. On the contrary, they were defrauded by Armstrong.

It would seem, on general principles, to be hardly

credible, that a swindle of the character of that perpetrated by Armstrong, so transparent in some of its features, could have been carried on through a period of several months, without being detected by persons of ordinary intelligence. But his relationship to the bankrupts, and their terms of intimacy with him, and the fact that they must have thought, if they believed what Armstrong told them, (and everything shows that they did,) that they were making, and not losing, money all the time, account, in a great measure, for what would otherwise seem incredible. It is, indeed, hard to believe that they could have supposed that they had $640,000 worth of ships, with which they were playing as with dice, while, at the same time, they gave no attention to the condition or whereabouts of any of the ships. But this is, perhaps, explainable on the ground, that the ships were, all through, to them a mere matter of purchase and sale, and not at all a matter of employment in traffic. None of them were understood to be held over a few days. Instead of being ships, they might as well have been fancy stocks, or merchandise of any kind. The whole thing, even as the bankrupts viewed it, was a mere gambling transaction, outside of their legitimate business, which they left to be managed by Armstrong. As it existed, in fact, it was a coinage of Armstrong's brain, the bankrupts believing all that he told them, and giving him such moneys and securities as he asked for, to carry out his represented traffic in ships, and receiving from him such moneys as he chose to pay them, and leaving in his hands, invested in the ships, as they supposed, all that he represented to be so invested, and making such entries in their books as corresponded with their dealings with Armstrong, and with his representations as to such investments. It turned out, on the part of the bankrupts, to have been credulity and misplaced confidence, superinduced by the spirit of speculation; but, after all, it differed but little from what, though,

perhaps, on a smaller scale, and in different forms, transpires daily, in a community where men are not satisfied with slow and certain gains.

The disposition made by the bankrupts of their tangible property, when they failed on the 1st of April, 1866, was not illegal at the time, nor invalid, nor tainted by fraud. There is nothing to impeach the *bona fides* of the debts in payment of which such property was appropriated.

The charge of wilful false swearing by the bankrupts in these proceedings, is not sustained. Nor are any of the specifications supported.

Discharges must be granted to all three of the bankrupts.

James Emott, C. A. Seward, and *Converse & Lyman,* for the bankrupts.

G. M. Speir and *C. E. Pratt,* for the opposing creditors.

MAY, 1869.

IN THE MATTER OF FREDERICK S. COMSTOCK AND JAMES M. WHEELER, BANKRUPTS.

PRACTICE.—CONTESTING PROOF OF DEBT.

On objection taken by a creditor to a proof of debt filed in bankruptcy proceedings, the order to show cause why the proof of debt should not be vacated must be made by the Court, and not by a Register.

IN this case a creditor had filed objections to a proof of debt filed by another creditor, and, on application by the former, the Register made an order requiring the latter to show cause before him why his proof of debt should

In the Matter of Andrew P. Van Tuyl, a Bankrupt.

not be vacated and the record thereof be cancelled. The parties appeared on the return day of the order, and the objection was taken that the Register had no jurisdiction to make the order, under the 22d section of the Bankruptcy Act. On request, the Register certified the question to the Court.

BLATCHFORD, J. The order made by the Register ought to have been made by the Court and not by the Register.

MAY, 1869.

IN THE MATTER OF ANDREW P. VAN TUYL, A BANKRUPT.

EXAMINATION OF BANKRUPT'S WIFE.—FAILURE TO ATTEND.—DISCHARGE.

Where an order was made by a Register requiring the attendance of a bankrupt's wife before him, to be examined in relation to the bankruptcy, which order was served on the bankrupt, but not on his wife, and she failed to attend:

Held, That, unless the bankrupt should prove, to the satisfaction of the Court, that he was unable to procure her attendance, the Register would not be warranted in certifying conformity, and the bankrupt would not be entitled to his discharge.

DURING the proceedings in this case, the Register, on the 4th of September, 1868, issued an order requiring the wife of the bankrupt to attend before him, and be examined in relation to the bankruptcy. She did not obey. The Register thereupon certified to the Court the questions, whether the order was properly granted, and whether, the order having been served upon the bankrupt, but not upon his wife, the bankrupt could obtain a discharge, in the absence of proof that he was unable to procure his wife's attendance.

BLATCHFORD, J. The order requiring the wife of the bankrupt to attend and be examined was properly granted. As the bankrupt was advised of the making of the order prior to the time specified in it for the attendance of his wife, and as she did not attend at the time and place specified in the order, the bankrupt is not entitled to a discharge, unless he shall prove, to the satisfaction of the Court, that he was unable to procure the attendance of his wife. Until he does that, the Register is not warranted in certifying conformity.

MAY, 1869.

THE STEAM PROPELLER NEREUS.

COLLISION IN EAST RIVER.—STEAMER AND SCHOONER.—RUNNING OUT TACK.

Where a schooner was beating through the East river, and went about without observing the approach of a large propeller, and she might have gone farther on before going about, and, after running about four lengths on such new tack, she struck the side of the propeller, 32 feet from the stern, with her bowsprit, head on, her master having done nothing, after she went about, to avoid the blow, and the propeller, which was going 8 or 9 knots an hour, having neither slowed nor stopped nor sheered:

Held, That the schooner was in fault in coming about without heeding the propeller, and when she could have kept on some distance farther;

That she might have slacked up in the wind till the propeller got by, or have fallen off when on her new tack;

That, if the propeller had slowed or stopped, she would probably have struck the schooner, and that she had not time to sheer, and was not in fault.

BLATCHFORD, J. This is a libel for a collision which occurred about 11 o'clock, A. M., on the 24th of November, 1865, between the schooner Connecticut and the steam propeller Nereus, in the East river, off 20th street in the city of New York. The schooner was bound from Elizabethport, New Jersey, to Bridgeport, Connecticut,

and was beating up the East river, against a strong breeze from the north northeast, the tide being strong flood. The Nereus was a large steam propeller, bound in the same direction with the schooner. The schooner, while on her starboard tack, approached near the New York shore, and came about to her port tack, and her sails filled, and she gathered way on her port tack, and had proceeded a distance of from two to four of her lengths on that tack, when her bowsprit struck the port side of the Nereus at a point 32 feet forward of the stern-post of the latter. The effect of the collision was to break the bowsprit of the schooner, and start her foremast and bring down her mainmast, and do other damage. The Nereus had not, before the collision, slackened her speed, or stopped, or changed her course. The defence on the part of the Nereus is, that the schooner came about to her port tack prematurely and negligently, and before she had run out her starboard tack as far as, in view of the approach of the Nereus, she should have done, and that, if she had held her starboard tack but a very short time longer, or, even if, after getting under way on her port tack, she had, on the approach of the Nereus, luffed up into the wind and held her jib away, the Nereus would have passed without colliding; and the fact that the Nereus was going at a speed of from 8 to 9 knots an hour, and would have passed over the 32 feet necessary to clear the schooner in less than 2 seconds, is urged to show that, under the circumstances, the schooner is wholly responsible for the collision. I think this defence is made out. Hays, the master of the schooner, who was at her wheel, testifies, that he did not see the Nereus until after he had got about upon his port tack, and that then he saw her under his boom, ahead of him. He had his foresail, mainsail and jib set. He says that he had gone not more than four lengths of his vessel on that tack before the collision took place. Turney, the mate of the schooner, who was forward on her deck, says that

he did not see the Nereus until she was from 20 to 25 rods off, but that he saw her before the schooner's helm was put up to go about, and before he let go the jib to go about, and that he saw her over the port side of the schooner. The schooner kept her course, on her new tack, without changing, up to the moment of collision, and made no attempt to luff or to pass under the steamer's stern. The master of the schooner attempts to excuse his not luffing, by saying that he had not way enough on his vessel. But, in any aspect, the schooner was in fault. It is clear that she went about without paying any heed to the Nereus, and, on the evidence, I am satisfied that she could have gone a sufficient distance further on her starboard tack to have enabled the Nereus to pass through the 32 feet in question, and that it was negligence in her not to do so. If she had sufficient steerage way on, upon her port tack, to either luff into the wind, or let her sheets go and fall off, it was her duty to have attempted to do so. If she had not sufficient steerage way to do so, as is claimed by her master, it was because she came about negligently, without paying any attention to the Nereus. On the testimony of Turney, her mate, there was no difficulty, after he discovered the Nereus, in letting the schooner shake in the wind, until the Nereus should have time to pass. I see no fault in the Nereus. If she had slackened her speed, or stopped her engine and reversed, when the schooner came about, she would undoubtedly have struck the schooner square on her starboard side, and probably have sunk her; and there was no time for her to sheer in either direction with any chance of advantage, with the strong flood tide that was running.

There must be a decree dismissing the libel, with costs.

Piper & Foster, for the libellants.

R. D. Benedict, for the claimants.

MAY, 1869.

THE SHIP STRATTON AUDLEY AND HER CARGO.

SALVAGE.—CORPORATION.—WORK AND LABOR.—COSTS.

A British ship, worth, with her cargo, $250,000, in attempting to enter the port of New York, at night, lost sight of the coast lights in a snow squall. Her port anchor was let go, but the chain parted. Her starboard anchor was then dropped. She dragged some distance, but finally brought up at the edge of the Romer shoal, in 27 feet of water, the tide being high. She drew 19½ feet aft, and, when the tide fell, there was but 21 feet of water under her, and, there being considerable sea on, her stern sometimes thumped heavily. About six o'clock the next morning, a steam-tug, owned by a corporation incorporated for the purpose of wrecking, came to her, and a conversation passed between the masters of the two vessels, in which the master of the tug said he would tow the ship off for $1,000, and the master of the ship offered $500. It was finally agreed that the tug should render assistance, and that the amount of compensation should be left to arbitration. The tug then took hold of the ship, and, with the aid of another tug belonging to the same corporation, got the ship off about noon, parting a hawser several times in doing so, and brought her up to New York, arriving there about four o'clock P. M. The wind had shifted from the eastward to south and west about the time the first tug came up. The owners and masters of the two tugs filed a libel against the ship and her cargo, for themselves and all interested, claiming $25,000 salvage. It appeared that the masters and crews of the tugs were employed on fixed rates of compensation, and would receive no share of the recovery:

Held, That the ship was in a condition to be the subject of a salvage service.

That, as the masters and crews were to have no share in the recovery, they must be wholly left out of the case.

That the corporation could not claim as assignee in advance of what might otherwise be the claims of its hired servants for salvage.

That the corporation itself could not be a salvor, what the law recognizes as the main element in a salvage service, namely, the impulse to boldness and heroism, being wholly wanting in the case of a corporation.

That the corporation was entitled to a proper compensation for the use of its two steamers, and of such of the appliances on board as were used in the service, without reference to the value of the ship and her cargo.

That the hazard to the tugs was to be considered in fixing such compensation.

That $1,500 was ample compensation, and, as the claimants had offered, before

suit brought, to pay $2,000 by way of compromise, no costs would be allowed to the libellants.

BLATCHFORD, J. This is a libel, filed by Thomas F. Marshall, master of the steamer Yankee, and David A. Wolcott, master of the steamer Rescue, and the Atlantic Submarine Wrecking Company, a corporation created by the State of New York, and authorized to engage in the business of wrecking and of assisting vessels in danger and distress, and who were the owners of the said steamers. The libel is filed by the libellants, for themselves and the crews of the said steamers, and claims the sum of $25,000, as a reasonable compensation, by way of salvage, or otherwise, for the services of the libellants and of the said crews in removing the ship Stratton Audley, a British vessel, and her cargo, from off the Romer shoal, near the entrance to the lower bay of the harbor of New York, where she was aground, on the 23d of March, 1869.

The answer gives substantially a correct version of the facts of the case, as they appear in evidence. The ship was bound from Calcutta to New York. She took a pilot off Barnegat Light about half past six o'clock in the evening of March 22d. At a quarter before eleven o'clock at night, while running for the bar at the entrance to the lower bay, she encountered a snow squall, which obscured the coast lights. Her port anchor was then let go, but the chain parted. Her starboard anchor was then dropped. She dragged for some distance with this, until she brought up in 27 feet of water. She drew 17¾ feet forward, and 19¼ feet aft. The tide, which was very high, being driven in by an easterly wind, so that low water was as high as ordinary high-water, fell, while the vessel lay in this position, so that there came to be but 21 feet of water under her aft, and, as there was considerable sea on, she struck bottom, occasionally, near her stern, and, when she struck, thumped heavily.

About six o'clock in the morning, the Yankee came within hail of the ship, and was asked by her master what the charge would be for towing the vessel off. Marshall, the master of the Yankee, asked, in reply, how much water the ship drew. The answer from the ship was, about 20 feet. Marshall asked how much water there was alongside of the ship. The answer was about 21 feet. Marshall asked if she was not striking. The reply was, once in a while. Marshall then said he would tow the ship off for $1,000. The master of the ship said that was too much, and offered $500. The Yankee then drifted out of hailing distance. She soon came up again to the ship. The master of the ship then asked Marshall: "How much did you say?" Marshall replied: "£2,000." The master said: "I understood you, dollars." "No," said Marshall, "I said pounds." It was then agreed that the Yankee should render her assistance, and that the amount of compensation should be left to arbitration. The Yankee then got a hawser to the ship, about six and a half o'clock A. M. The Rescue soon came up, and aided the Yankee in pulling, there being a hawser from the stern of the Rescue to the bow of the Yankee, and another hawser from the stern of the Yankee to the ship. The latter hawser, which belonged to the Yankee, and was a new one, eight inches in circumference, parted, and was put in place again, with another hawser, which belonged to the ship. The two were then pulled with until the ship's hawser broke. The pulling with the other hawser was continued, the ship being moved as the sea lifted her, until that hawser parted again. The hawser from the Rescue to the Yankee parted two or three times. The result was, that, by the use of hawsers, and hawsers alone, and the power of the two tugs, the ship was hauled off into deep water about noon, a space of six hours from the time the Yankee first reached her. She was towed by the tugs to New York, arriving there about four o'clock P. M. She was

an iron vessel, and, so far as appears, was not injured or strained. When the Yankee reached the ship, it was the beginning of the ebb tide, and the wind had shifted from the eastward, and came out light from the south and west, but the sea did not abate. It was low water about 10 o'clock A. M., and about that time the wind got around to the west or northwest. The answer avers a willingness and readiness, on the part of the claimants, at all times, to submit to arbitration the question of the amount to be allowed to the libellants for the service, as one of towage, but alleges that the libellants have, at all times, insisted on submitting their claim to arbitration as one of salvage. The claim is pressed upon the Court by the libellants as one of salvage. The value of the ship and her cargo was $250,000. The value of the two steamers, at the time, was about $80,000, and the value of the wrecking apparatus and material on board of them was about $50,000 more.

I think, on the evidence, that the peril to the ship at and after the time the Yankee reached her, has been very much exaggerated by the libellants. So, too, the danger to the steamers has been inadequately magnified, in order to enhance the value of the service. But substantial service was rendered to the ship by the two steamers, and for that service a liberal, but at the same time a reasonable, compensation must be awarded. The ship was undoubtedly in a condition to be the subject of a salvage service, but, on the principles settled by the Circuit Court for this District, in the case of *The Morning Star*, (6 *Blatchf. C. C. R.*, 154,) and applied by this Court in the case of *The J. F. Farlan*, (*ante*, 206,) no salvage compensation for the service rendered in this case can be awarded to any of the libellants. The masters and crews of the steamers were hired on wages by the corporation, which owned the steamers and all the apparatus and material on board of them. They received those wages steadily, whether the steamers

were employed or not. Their compensation for the services they rendered to this ship, and for the time occupied in rendering those services, was not at all dependent on the success of those services. In rendering those services, they did not render them directly to the ship, but they rendered them incidentally in the discharge of, and as a part of, their duty to their employers. When they were hired, they were given to understand by the corporation, that they should receive only their wages, and that they should have no share otherwise in any earnings of the vessels or of the corporation; and none of them will have any share in anything that may be awarded to the libellants in this case. The masters and crews of the steamers must, therefore, be wholly left out of the case. The corporation cannot claim as assignee in advance of what might otherwise be the claims of its hired servants for salvage; and those servants, having cut themselves off, by their contract with the corporation, from setting up any claim for salvage in this case, such claim never had any existence, so as to be capable of assignment after the fact.

Nor can the corporation itself be a salvor. It cannot hire persons on wages, and claim salvage for services rendered by those persons. If such a principle were to be admitted, it would have to be extended to individuals; and yet it was never heard, that one person could hire another on wages to perform a salvage service to a vessel in distress and to have no share otherwise in the compensation therefor, and that, after such service had been rendered by the latter, the former, who had taken no personal part in it, could claim salvage compensation therefor, as such. Yet that is precisely the claim which the libellant corporation in this case is urging, when it asks to be paid as if it had been an individual salvor. The main element which the law recognizes and requires as an element in a salvage service, is wholly wanting in the case of a corporation. That element is, the impulse

and stimulus which spurs the individual salvor to manifest boldness and heroism and incur risk and peril, by the expectation of the large compensation which the law awards in case of success. That element was wholly wanting in this case. The ship and her cargo, as a consideration for their liability to pay a salvage compensation, were entitled to the exercise of all the energies which individual salvors could put forth, impelled by all the hopes of salvage reward which could operate to stimulate those energies. There were no such hopes of salvage reward in this case, on the part of the officers and crew of the steamers; and it is at least doubtful—in view of the fact that the Yankee failed, through timidity, to reach the ship, until on the third attempt to do so, while a pilot boat and her yawl boat seemed to have no difficulty in navigating safely in a no less boisterous sea—whether the same energies were put forth by those on board of the Yankee to reach the ship promptly that would have been manifested if they had been working for themselves and not merely for their employers. The master of the Yankee says that he turned back, on his first attempt to reach the ship, because he considered the risk too great, and that he abandoned the second attempt because he would not run the risk until daylight. It is very questionable whether wrecking corporations for salvage business, with their employees placed on the footing occupied by those of this corporation, are, on the whole, of advantage to commerce. There is, on the one hand, the benefit of associated capital of large amount, with well fitted appliances for the business. But this has the effect to drive individual salvors out of the business, and the daring and courage and insensibility to danger, nerved by the prospect of large reward, which are manifested constantly by individual salvors, are replaced by the poor substitute of hired labor, which has nothing to gain by taking risks, and is, therefore, likely to fail to use promptly, at critical moments, the ample means placed at its disposal.

The corporation is entitled to a proper compensation for the use of its two steamers, and of such of the appliances on board of them as were used in the service rendered to this ship. The case must be viewed as one of contract, for work and labor, without reference to the value of the ship and her cargo, as an element in the measure of compensation. Marshall, the master of the Yankee, placed it in that position, by what passed between him and the master of the ship. It is manifest, that the latter, by regarding $1,000 as a large charge, and offering $500, had no idea that he was subjecting his vessel and cargo to a salvage charge. It is entirely clear, on the evidence, that if he had been told that, if he allowed himself to be towed off from where he was, by the Yankee, he would, in the end, be obliged to pay her owners a compensation of $25,000 for the service, he would have assumed the risk of remaining there, the wind having already changed to a favorable quarter, until a vessel, more moderate in her demands, should come to his aid. The master of the ship says, that he heard no mention of any price by Marshall, except $1,000, and that he heard nothing about £2,000, or about any pounds.

The hazard to the steamers and the property on board of them, whatever it was, is to be taken into view, as making the service worth more than if there had been no hazard to them. But the idea that a proportion of the cost of maintaining the steamers and property for occasional service, and of the current expenses of the corporation, while such steamers and property are not employed in the service of this ship, is to be paid by this ship, is wholly inadmissible. In this case, the corporation would have had a claim for compensation for the time and services of the steamers in endeavoring to pull the vessel off, even if they had failed. Their compensation must, of course, be greater because of their success.

I wholly reject the testimony of the so-called ex-

pert witnesses on both sides, who give evidence as to their opinion of the value in money of the services rendered. They proceed on grounds which are unsound, and not in consonance with the views which, as above stated, must govern this case.

On the whole evidence, I think $1,500 is ample compensation in this case, and, as the claimants, before suit was brought, offered to pay $2,000 by way of compromise, I allow no costs to the libellants.*

E. W. Stoughton and *J. E. Parsons*, for the libellants.

E. C. Benedict and *T. Scudder*, for the claimants.

MAY, 1869.

THE TUG-BOAT JAMES A. WRIGHT.

MASTER.—AGENT.—TOW-BOAT.—ICE.—NEGLIGENCE.

Where D., the master of a barge, which lay, laden with coal, at Newburgh, was discharged, and was notified that the barge was put in charge of one W., and on the same day D. was told by the owners of the cargo, who were agents of the owners of the barge, to bring the barge and her load to New York if he got a chance, whereupon he applied to a tug to tow the barge down, and the master of the tug told him it was not safe to take her down, on account of the ice, whereupon D. said he would take the risk, and the tug took hold of her, and, while the barge was being hauled out, W. caused the master of the tug to be told that he must not take the barge, as D. had no authority, but, as D. agreed to take the risk, the tug took the barge in tow, and, in going down the river, the barge was cut through by the ice and sunk, and the owners of the barge and the cargo filed libels to recover for the loss:

Held, That D. had no authority on behalf of the libellants to take for them the risk of going through the ice;

That the tug, under the circumstances, took all the risks of safe towage, and it was negligence to tow the barge into the ice, and the tug was liable for the loss.

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* The libellants appealed to the Circuit Court from this decision. That Court, although the rule in the case of *The Morning Star* had been overruled by the case of *The Camanche*, (8 *Wall.*, 448,) affirmed this decree, in January, 1871.

The Tug-boat James A. Wright.

BLATCHFORD, J. These were two libels filed, the first one by the owner of the barge Arctic, and the second one by the owners of a cargo of coal on board of her, to recover damages for the loss of the barge and her cargo, in consequence of her having been cut through by ice in the Hudson river, in the gorge just above West Point, and sunk, about dusk on the evening of the 27th of December, 1867, while in tow of the steam-tug James A. Wright, from Newburgh bound to New York. The libels allege that the barge was taken in tow without authority, and after those in charge of the tug had been forbidden to take her, and that the loss occurred through the fault, negligence and want of care of those in charge of the tug. The defence set up in the answers is, that the towing was authorized by one Dodge, as master of the barge, and in command of her, and exercising control over her navigation; that Dodge agreed to take the risk of the ice; that the barge, on the voyage, sprung a leak by striking ice, and sank because she did not have a proper pump; and that the loss did not happen through fault, negligence and want of care of those on the tug. This defence is sought to be made out principally by the deposition of Dodge, which has been taken on the part of the claimants, but, instead of aiding the defence, it satisfactorily establishes the case on the part of the libellants. The barge was taken in tow, at Newburgh, during the afternoon of the 27th of December. Dodge testifies that he was discharged as master on the 24th of December, and was then notified that the barge was put in charge of one Wanzer, at Newburgh; that, after he was discharged, but on the same day, he was told by the owners of the cargo, who were the agents of the owner of the barge, to bring the barge and her load of coal to New York, if he got a chance; that the master of the tug told him, before they started, that there was ice in the river below, and that it was not safe to take the boat down; that he told the master of the tug that he would take the

risk of the ice himself; that, when the barge was about to be taken in tow, he heard the master of the tug and his men forbidden, by a person on the dock, at Newburgh, to move her; that she had a pump which was in good order; that the ice was choked up at West Point, and could be seen ahead before it was reached, there being no open passage through it; and that, after the barge was cut through by the ice, he pumped with the pump until he found she could not be saved. It appears, by other testimony, that Wanzer, on seeing the barge being hauled out to be towed, caused the master of the tug to be told that he must not take the barge with him, as Dodge had no authority. Upon this, the master of the tug at first refused to tow the barge, but, at length, he proposed to Dodge to run the risk, and Dodge said he would take the risk, and then the barge was taken in tow. At the most, therefore, Dodge had authority only to bring the barge and her cargo to New York. He had no authority to have a hole cut in the barge by the ice, and to deposit her and her cargo at the bottom of the river, instead of landing her at New York safely; and he had no authority, on behalf of the libellants, to take for them the risk of going into and through the ice choked up at West Point, at a time when the master of the tug expressly told him that it was not safe to take the boat down. The tug, taking the barge in tow, under the circumstances above stated, took all the risk of her safe towage, and it was negligence on the part of the tug to drag the barge into the choked ice, so that she could be and was cut through and sunk.

There must be decrees for the libellants, in both cases, with costs, with references to compute the damages.

W. R. Beebe, for the libellants.

D. McMahon, for the claimants.

MAY, 1869.

THE CANAL-BOAT JOHN J. WILTSIE.

Master.—Failure to Exhibit Enrolment.

Where a canal-boat was not enrolled or licensed, and had no documents:

Held, That the failure of the master to exhibit such enrolment or license when demanded, did not subject the vessel to the penalty provided by the 13th section of the Act of February 18th, 1793, (1 *Stat. at Large,* 309.)

THIS was an information, filed in behalf of the United States against a canal-boat, to recover a penalty for the failure of her master to exhibit to the proper officer of the revenue an enrolment or license, when demanded. It was admitted that the vessel had not taken out any enrolment or license, and that the master could not exhibit any enrolment or license, when the demand was made.

For the United States, *E. Pierrepont, U. S. Dist. Atty.*

For claimants, *O. Frisbie.*

BLATCHFORD, J. As it is admitted, in this case, that the canal-boat was not enrolled or licensed, and had no documents to exhibit to the officer, there was no violation of the 13th section of the Act of February 18th, 1793, (1 *U. S. Stat. at Large,* 309,) on the part of the master of the boat, in not exhibiting an enrolment or license to the proper officer. The information does not allege that the vessel was enrolled or licensed, nor does it allege that the vessel was not enrolled or licensed. It merely alleges that the vessel was required to be enrolled and licensed, and that there was a violation of the said 13th section, by the neglect and refusal of the master to

exhibit the enrolment and license of the vessel. The 13th section was intended to inflict a penalty only for the failure of the master of the vessel to exhibit the enrolment or license of the vessel, when required to do so, provided the vessel had taken out, in fact, an enrolment or license. The section provides, "that it shall be lawful, at all times, for any officer concerned in the collection of the revenue, to inspect the enrolment or license of any ship or vessel, and, if the master of any such ship or vessel shall not exhibit the same, when thereunto required by such officer, he shall pay one hundred dollars." By the provisions of the 8th section of the Act of July 18th, 1866, (14 *U. S. Stat. at Large*, 180,) where the master of a vessel is subject to a penalty for a violation of the revenue laws, the vessel is holden for the payment of the penalty, and may be seized and libelled therefor. A failure to exhibit an enrolment or a license, under the 13th section of the Act of 1793, presupposes that the document has been taken out by the vessel. The penalties for trading with a vessel without her being enrolled and licensed, are inflicted by the 6th section of the Act. There are no allegations in the information founded on any violation of that section.

The information is dismissed.

Eastern District of New York,

MAY, 1869.

THE STEAMBOAT STATE OF NEW YORK.

COLLISION AT PIERS.—STEAMER COMING IN AND STEAMER GOING OUT.—USAGE.—RIGHT OF WAY.

Where two steamers used the same pier, the State of New York, a large steamer running through the Sound, whose berth was at the side of the pier, and whose hour of departure was 4 P. M., and the Sylvan Stream, a small steamer which made rapid trips up and down the East river, coming in at about 4 P. M., and leaving at 4.15; and it was the usage of the latter on that trip, if she came before the former had started, to stop off in the stream and whistle, and, if the former did not answer or start, to come to the end of the pier and land her passengers before the former started; and, on one occasion, coming according to this usage and whistling, and receiving no answer, she started to come to the pier, and had almost reached it, when the State of New York started to come out, and, though her engine was stopped and backed, it was not done soon enough to prevent a collision, her stem striking the smaller steamer a square blow on the end of her shaft, and being at the time about three feet outside of the end of the pier;

Held, That the Sylvan Stream, having begun to make her landing before the State of New York had begun to move, was, under the circumstances, entitled to complete it without embarrassment from the latter;

That she was not bound, under the circumstances, to deviate from her usual mode of making the landing;

That the collision occurred from negligence on the part of the State of New York, in starting when she did, which happened because the pilot who started her, did so from aft, where he could not see ahead, and then walked forward to his post in the pilot-house, the vessel thus, for a short period, running right into danger, with no one to stop her.

THIS was a cause of collision instituted by the Harlem & New York Transportation Co., owners of the steamboat Sylvan Stream, against the steamboat State of New York, to recover the damages sustained by the former vessel, in a collision which occurred in the East river, on the afternoon of the 13th day of June, 1867.

The Sylvan Stream was a fast steamboat, which made hourly trips between Pier 24, in the East river, and Harlem; and the State of New York was a Sound steamer, whose berth was at the upper side of the same pier. The sailing hour of the State of New York was 4 P. M., at which time the Sylvan Stream usually arrived at Pier 27, and, when the tide was flood, she, at that hour, landed at the end of the pier, with her head down stream. To avoid embarrassing each other, it had been the practice between these two boats, that, when upon the 4 o'clock trip, the Harlem boat arrived near Pier 24 before the State of New York had commenced to move out of her berth, she stopped in the river, a short distance above Pier 24, to allow the State of New York to pass out ahead of her, if ready to move; if the State of New York was not ready, then the Harlem boat started again, and made her landing at the end of the pier before the State of New York left her berth. On the day of the collision, the Sylvan Stream arrived before the State of New York had started, and, in accordance with the usage, stopped off Pier 27, and, as she claimed, blew her whistle to call the attention of the State of New York to her presence. The State of New York did not begin to move, and, accordingly, the Stream started again to make the landing. But soon after she had begun to move in towards Pier 24, and while she was so crossing the bows of the State of New York, the State of New York started her engines. After she had begun to move out, it was, however, discovered by those in charge of the State of New York, that the Stream had already started, whereupon the engine of the State of New York was, at once, stopped and reversed, but, before her headway could be entirely stopped, she struck the Sylvan Stream a square blow upon the end of her starboard shaft—the Sylvan Stream having then arrived at the end of Pier 24, and being just about to throw out her plank. The blow was not a heavy one, as the State

of New York was barely moving, her stem not being over three feet outside of the end of the pier; but, being upon the shaft, it caused an injury to the engine, for which injury this suit was brought.

For libellants, *Benedict & Benedict.*

For claimants, *J. W. C. Leveridge* and *R. H. Huntley.*

BENEDICT, J. The facts which are undisputed make a clear case in favor of the libellants, as it appears to me. It was a manifest error in the State of New York to commence to move after the Stream had started up, and was reaching in to make her landing, at the end of Pier 24. She should have waited until the Stream had reached her landing-place at the pier. The Stream having commenced to make her landing before the State of New York had commenced to move, was, under the circumstances, entitled to complete it without embarrassment from the State of New York, and this she could have accomplished without causing a delay of more than a moment or two.

Much evidence was given upon the hearing, tending to show, on the one side, that the Stream stopped and backed her engine after the State of New York began to move, when she might have kept on, and thus avoided the collision; and, on the other side, to show that she was compelled to stop and back, to avoid running into the pier. But it is clearly shown that she made her landing in the usual way, and, if it be assumed that the evidence shows that, in case she had kept on by her pier, the collision would have been avoided, the fact is not material, in the aspect in which I view the case.

The operation of landing, at the end of the pier, was a single and well-known operation, to be executed with dispatch, in a rapid tide-way. It necessarily involved a crossing of the bows of the State of New York, and a

stopping and backing, to bring up properly at the pier, and it required but a short period of time for its completion. Having properly undertaken this manœuvre before the State of New York began to move out, the Stream was fully justified in completing it, upon the assumption that the State of New York would not move out in such a way as to interfere with her.

The collision arose from negligence on the part of the State of New York, in beginning to move when she did; and this happened because the pilot who started her, and who, as I understand the evidence, had the sole control of the engine bells when he started her, stood aft, where he could not see out ahead, and then walked forward a considerable portion of the length of the boat, to his proper post at the pilot-house. The State of New York was thus, for a short period of time, moving directly into danger of collision, with no one to stop her. The period of time was very short, it is true, but it was sufficient to cause the collision, for the evidence shows that three feet would have avoided it.

It must be remembered, also, that this is not the case of two vessels meeting or crossing in their courses at sea, but of one vessel departing from the side of a pier, at the end of which the other was to land. The vessels were passenger boats, running by time-tables, and, certainly, so far as the Sylvan Stream was concerned, compelled to make landings rapidly, as the State of New York knew. The State of New York had the opportunity given her to make her departure first. Not being ready to do so, she was bound to wait quietly till the Sylvan Stream had made her landing; and, having failed to do so, she should be held solely responsible for the collision, even if it were true that the Stream, by abandoning her landing, could have escaped the danger which the fault of the State of New York had thrust upon her. She was not bound to abandon her landing, but had the right to keep on, and rely upon the State of New York's

stopping in time to avoid her. The rule here laid down, as applicable to vessels situated as these two vessels were, seems to me necessary, to avoid constant danger and controversy, and one which will work injustice to no one.

The decree must, accordingly, be for the libellant, with a reference to ascertain the amount.

MAY, 1869.

THE UNITED STATES *vs.* ROBERT D. BOGART.

U. S. Navy.—Paymaster's Clerk.—Embezzlement.

A paymaster's clerk in the navy is "a person in the naval forces of the United States," within the meaning of the first section of the Act of March 2d, 1863, (12 *Stat. at Large, p.* 696,) and if he embezzles funds of the United States, he is not liable to the penalty provided in the third section of that Act, but is liable for the amount embezzled.

Benedict, J. This case comes before the Court on a motion for judgment on a verdict, taken subject to the opinion of the Court. The action is brought in behalf of the United States, against the defendant, who was a paymaster's clerk in the United States navy, and a recovery is claimed under the provisions of the Act of March 2d, 1863, (12 *Stat. at Large, p.* 696.)

This statute provides, in the 1st section, among other things, that any person in the land or naval forces of the United States, or in the militia in actual service, who shall steal, embezzle, or knowingly and willfully misappropriate, or apply to his own use or benefit, any money or other property of the United States, shall be deemed guilty of a criminal offence, and shall be subject to trial and punishment by a court-martial, in the manner pro-

vided by the Act. In the 3d section of the Act, it is further provided, that any person not in the military or naval forces of the United States, nor in the militia called into or actively employed in the service of the United States, who shall do or commit any of the acts prohibited in the 1st section, shall forfeit and pay to the United States, the sum of $2,000, and, in addition, double the amount of damages, which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit.

Upon the trial of the cause, evidence was given on the part of the Government, showing that the defendant was a paymaster's clerk, on board the receiving ship Vermont, and that, while acting in that capacity, he converted to his own use certain moneys belonging to the United States; and the jury, under objections on the part of the defendant, were instructed to bring in a verdict for the sum of $2,000, and, in addition, double the amount of damages which they found the Government to have sustained by reason of the acts of the defendant; reserving for the opinion of the Court the question of the applicability of the 3d section of the Act of March 2d, 1863, to a person holding the position which the defendant did.

The question thus reserved I have now considered, and am of the opinion that the ruling at the trial cannot be sustained.

The defendant was shown to be a paymaster's clerk, regularly appointed as such, and at the time in question in actual service on board the national ship Vermont. In this capacity, he had charge of certain funds of the United States, to be used by him in payment of seamen and other persons on the pay rolls of the navy, which he converted to his own use.

Persons holding such positions, are appointed by

virtue of a statute providing for the organization of the navy. They are required to wear the uniform of the navy. They are upon the pay rolls of the navy, and draw pay as part of the naval forces. They have a rank in the navy. They are compelled to bind themselves to be governed by the laws and regulations for the government of the navy, and I cannot doubt that they would be held liable to trial by court-martial.

The 3d section of the Act of 1863, is only applicable to persons not in the military or naval forces of the United States, and cannot be held applicable to persons who would be liable to trial by court-martial, under the 1st section.

In the case of a paymaster's clerk in the army, arrested for trial before a court-martial, for acts prohibited by the 1st section of the Act of March 2d, 1863, it has been held that such a person was in the military service, and liable to trial by a military tribunal, and not entitled to be discharged on *habeas corpus*, (*In the matter of John Thomas, Hill, J., U. S. Dist. Court for the Southern Dist. of Mississippi*, 1 *Chicago Legal News, p.* 245.)

I can see no ground for a distinction between the army and the navy, in regard to the status of this officer, and must hold that the defendant was in the naval forces of the United States, and liable to trial by court-martial as such. If the defendant was in the naval forces, he is not liable to the penalties prescribed by the 3d section of the Act of March 2d, 1863, and the verdict therefore being for $2,000, and, in addition, double the amount of damages proved, according to the provisions of the 3d section of that Act, does not warrant judgment for that amount.

There must, accordingly, be a new trial, unless the Government consent to reduce the verdict to the amount of actual damages, as proved.

MAY, 1869.

IN THE MATTER OF JOHN F. COCKS, A BANKRUPT.

BAKER.—TRADESMAN.

A baker, who buys flour, which he makes into bread, and sells the bread to daily customers, is a tradesman within the meaning of the 29th section of the Bankruptcy Act, and is not entitled to a discharge, if he has not kept proper books of account.

BENEDICT, J. This case raises the question whether a person whose occupation is that of a baker, and who buys flour, which he converts into bread, and then sells the bread to daily customers, is to be deemed a tradesman, within the meaning of the 29th section of the Bankrupt Act, and therefore not entitled to a discharge, where it appears that he has kept no books of account whatever.

As neither counsel have referred to any authority bearing upon the question, I am justified in assuming for the purposes of this case that no authorities exist, either in this country or in England, which throw any light upon the subject. In the absence of any light from authorities, I incline to the opinion that the petitioner must be held to be a tradesman, and, therefore, not entitled to a discharge, for the reason that it appears that he has kept no books of account.

MAY, 1869.

THE STEAMSHIP NEBRASKA.

DAMAGES BY COLLISION.—VESSEL SUNK AT PIER.—COST OF RAISING.—TOTAL LOSS.

Where a canal-boat, with a cargo of coal on board, lying at a pier in the harbor of New York, was struck by a steamship and sunk in thirty feet of water, and it was not possible to ascertain the amount of her injury as she lay, and her owner contracted to have her raised for $500, and she was raised and put upon ways, and then, on an examination and survey, it was found that she was not worth repairing, and she was sold at auction for $100:

Held, That the owner of the canal-boat was entitled to recover as damages the value of the boat as a total loss, deducting the sum for which she was sold, and, in addition, the cost of raising the boat, and of putting her on the ways to be examined, after she was raised.

BENEDICT, J. This case comes before the Court upon exceptions to the Commissioner's report of the amount of damages sustained by the libellant, by reason of the sinking of his canal-boat, the "Sarah Ball," in a collision with the Nebraska.

The boat when sunk was lying at the end of a pier in the harbor of New York, and had on board a cargo of coal. Where the vessel sunk the water was about 30 feet deep, and it was not possible to ascertain the extent of her injuries as she lay upon the bottom, but it was manifestly possible to raise her. A contract was accordingly made with a wrecking company to raise her for $500, and she was thereupon raised and placed upon ways and examined. She was then found to be so much injured that the cost of repairing would exceed her value when repaired, whereupon she was sold at auction for $100.

The Commissioner allowed the value of the vessel previous to the collision, (as a total loss,) less the pro-

ceeds of her sale, and in addition the expenses of raising her and placing her upon the ways.

To this report the only serious objection taken relates to the allowance of the expenses of raising the vessel, and placing her upon the ways, and it is insisted, on the part of the claimant, that the raising of the vessel was at the risk of the party incurring the expense, and was not chargeable against the wrong doer, in addition to the value of the vessel, it having turned out that the vessel was not worth raising. In support of this position, the case of the Metropolis, decided by Judge Betts and affirmed by Mr. Justice Nelson, and also by the Supreme Court, is relied on as an authority.

The law laid down in the case of the Metropolis, I do not conceive to be applicable in the present case. In the case of the Metropolis, the vessel was sunk in the middle of the Sound, some sixteen miles wide, and there was no reasonable ground for supposing that efforts to raise her would be attended with success. Here the vessel was sunk at a pier, where it was known that she could be raised at an expense of $500; and when, until she was raised, it was impossible to ascertain whether it would be expedient to repair her or not. Under such circumstances, it seems to me that it was incumbent upon a prudent owner to have the vessel raised. The raising was a necessary proceeding to enable the libellant to determine his course as to her repairs, and to compute his loss, and he is entitled to be repaid the reasonable expense thereby incurred. Such was the ruling in the case of The Engineer, (1 *Lush.* 138.)

Furthermore, this vessel was sunk at a pier where she was an obstruction to the harbor of New York. She could not lawfully be permitted to remain where she was, and, if not raised by the libellant, might be removed by the Commissioners of Pilots at the expense of the libellant. (*Laws of N. Y.*, 1860, *chap.* 522, *sec.* 1.)

The libellant was, therefore, bound to raise her, and

the expenses, to which he was put, became a part of the damages caused by the collision. The allowance of the expense of raising seems to me, therefore, to be correct. As to the expense of the ways, I am also of the opinion that it was a necessary expenditure, to enable the libellant to examine his vessel, in order to determine his course as to repairs, and it is, therefore, properly allowed.

The report must be confirmed.

For libellant, *Benedict & Benedict.*

For claimants, *Owen, Nash & Gray.*

Northern District of New York,

MAY, 1869.

THE BARGE LEONARD.

ADMIRALTY JURISDICTION.—CONTRACT OF AFFREIGHTMENT.—WATERS WITHIN A STATE.

Where a libel was filed against a vessel upon a contract to carry cargo on board of her from New York city to Troy, in the same State, to recover damages for an injury, from negligence, received by the cargo on the voyage, the owners of the vessel and cargo all being residents of New York State:

Held, That the cause was one of admiralty jurisdiction.

THIS was a suit against the barge Leonard, arising out of a contract of affreightment, for the transportation of certain merchandise, for hire, from the city of New York to the city of Troy. The libel alleged that the claimants, McManus and Smith, were the owners of the barge at the several times in the libel mentioned,

and were engaged in the business of common carriers of goods, wares, and merchandise, for hire, between the cities of New York and Troy, in the State of New York, upon the Hudson river, a navigable stream, in which, between the said two cities, the tide ebbs and flows, and which is subject to the maritime laws of the United States, and was so subject during the time thereinafter mentioned. It also averred that the claimants carried on their said business upon said river, in and upon the said barge Leonard, owned by them; and then set forth a contract between the libellants and the owners of the barge, for the carriage and transportation from the city of New York to the city of Troy, upon the said barge, of forty-two barrels of sugar and one hundred and twenty-nine chests of tea, of the value of $6,679.80, then belonging to the libellants, and the receipt of such sugar and tea by the claimants. It also alleged, in the usual form, that the owners of the barge, in consideration of the premises and of a certain reasonable reward agreed to be paid by the libellants, agreed with the libellants safely and securely to carry and transport such sugar and tea, as such common carriers aforesaid, upon the barge Leonard, from New York to Troy, within a reasonable time, and, on the arrival thereof at Troy, to deliver the same to the libellants. It then averred that the claimants commenced the transportation so contracted for upon the said Hudson river, in and upon the said barge Leonard, as such common carriers; that they did not safely and securely carry and deliver such sugar and tea according to their contract, and that, by the unsafe and defective condition of the barge while on said voyage, and while such sugar and tea was therein and in the possession of the claimants, and by the carelessness and negligence of the claimants and their servants in the management of such barge, large quantities of water came into said barge, and upon and into such sugar and tea within this

judicial district, whereby the libellants sustained damages to the amount of $5,288.35.

The claimants filed, with their claim and answer, an exceptive allegation, in the nature of a demurrer for want of jurisdiction. In this it was alleged that this court had no jurisdiction of the matters contained in the libel: that the same were not matters of admiralty and maritime jurisdiction, the libel being filed to recover upon a contract of affreightment to be performed wholly within the State of New York, and the said barge not being engaged in commerce upon the high seas, or between ports lying in different States, but solely and exclusively engaged in the internal commerce of the State of New York, and the libellants and claimants all being residents and citizens of that State.

The case was argued on this exceptive allegation, by W. A. Beach for the libellants, and M. Hale for the claimants.

Mr. Hale, for the claimants, cited *Allen* v. *Newberry*, 21 *Howard*, 224; *Maguire* v. *Card*, *id.* 148; *The Brooklyn*, 2 *Ben. R.* 547; *The Commerce*, 1 *Black*, 574; 3 *Story on the Const. secs.* 1663, 1665; 1 *Kent's Com.* 366 *to* 377; *Thomas* v. *Lane*, 2 *Sumner*, 9; *Philadelphia, &c. R. R. Co.* v. *Philadelphia & H. de G. Tow-boat Co.* 23 *Howard*, 209, affirming same case, 5 *Am. Law Reg.* 280; *Steamboat Magnolia*, 20 *Howard*, 296; *The Plymouth*, 3d *Wallace*, 20; *Gibbons* v. *Ogden*, 9 *Wheaton*, 194, 195.

Mr. Beach, for the libellants, cited *Conkling's Admiralty, pp.* 21, 26, 166, 167, *and notes*; *The Steamboat Jefferson*, 10 *Wheaton*, 428; *Peyroux* v. *Howard*, 7 *Peters*, 324, 343; *Steamboat Orleans* v. *Phœbus*, 11 *id.* 175; *The Genesee Chief*, 12 *Howard*, 443; *The Hine* v. *Trevor*, 4th *Wallace*, 555; *The New Jersey S. N. Co.* v. *The Merchants' Bank of Boston*, 6 *Howard*, 344; *The Vanderbilt*, 6 *Wallace*, 225.

HALL, J. The contract of affreightment set forth in the libel in this case was for the transportation, by

water, on board a vessel engaged in the business of commerce and navigation; and it was to be wholly performed within the ebb and flow of the tide. The contract, in its subject-matter and in its whole extent and character, was exclusively maritime; and the waters on which it was to be performed, from the commencement to the termination of the voyage required for its performance, were wholly within the jurisdiction of the admiralty, so far as the question of admiralty jurisdiction can depend upon locality or the character or navigable capacity of the waters on which a marine tort has been committed or a maritime contract is to be performed. Such being the character of the contract, and such the description of the waters upon which it was to be performed, it is supposed that no admiralty judge would have hesitated, during the half century next succeeding the adoption of the Constitution of the United States and the passage of the Judiciary Act of 1789, to maintain the jurisdiction now invoked. Indeed, it is believed that no suggestion, that the admiralty jurisdiction of the courts of the United States might be restricted by the limitations upon the constitutional power of Congress to regulate commerce, is reported as having been made, in any court of the United States, until the case of *The New Jersey Steam Navigation Company* v. *The Merchants' Bank of Boston* (6 *Howard*, 344) came before the Supreme Court of the United States in 1848. The suggestion then made by Mr. Justice Nelson, though a mere *obiter dictum*, was nevertheless entitled to very grave consideration as the opinion of a judge justly distinguished for the soundness and ability of his judicial decisions.

The subsequent case of the Genesee Chief, in which the Supreme Court overruled prior decisions and decided that the jurisdiction of the Admiralty Courts was not confined to tide waters, and also decided that Congress had the authority, under the constitutional

grant of admiralty and maritime jurisdiction, to extend that jurisdiction to the great lakes and their connecting waters, although it had no authority to do so under the grant of power to regulate commerce, seemed to be sufficient to more than countervail the force of Mr. Justice Nelson's suggestion in the Merchants' Bank case; and it was not until the cases of *Allen* v. *Newberry*, (25 *Howard*, 224) and *Maguire* v. *Card*, (*id.* 248,) decided in December term, 1858, that the jurisdiction of the admiralty, in cases like the present, was afterwards considered questionable. In neither of the two cases just alluded to does it appear that the question was argued; and though the decisions have been followed in the District and Circuit Courts, in parallel cases, upon the ground of their paramount authority, it is nevertheless quite certain that they have not, in all cases, received the approval of the bench and bar of those courts.

In the case of *The Western Transportation Company* v. *The Great Western* (4 *Western Law Monthly*, 281) which was a case of salvage, I had occasion, several years since, to consider the cases of *Allen* v. *Newberry* and *Maguire* v. *Card*, in connection with the Act of 1845, the case of the Genesee Chief, and other cases which appeared to me to be opposed to the doctrine of the two cases just alluded to. In speaking of these cases I then said: "I confess that I am not able to perceive any solid ground for thus restricting the admiralty jurisdiction of the national courts. The constitutional grant of admiralty jurisdiction has no such limitation. It is an independent grant of judicial power or jurisdiction, unconnected with the grant of commercial power; and, to adopt the language of Mr. Justice Grier, in the case of *The Magnolia*, (20 *Howard*, 301,) where it is used for another purpose, 'the admiralty jurisdiction, surrendered by the States to the Union, had no such bounds as exercised by themselves, and is clogged with no such conditions in its surrender.' In the Genesee Chief it was

said by the Chief Justice: 'Nor can the jurisdiction of the courts of the United States be made to depend on regulations of commerce. They are entirely distinct things, having no necessary connection with one another, and are conferred in the Constitution by separate and distinct grants. The extent of the judicial power is carefully defined and limited, and Congress cannot enlarge it to suit even the wants of commerce, nor for the more convenient execution of its commercial regulations.' It was conclusively shown in that case, that the power of regulating commerce could not be made the foundation of jurisdiction in the courts of the United States, and I cannot satisfy myself that the courts of the Union are justified in interpolating the language or limitations of the grant of the commercial power into the grant of judicial power and jurisdiction, for the purpose of restricting, any more than enlarging, their jurisdiction. That jurisdiction must rest upon the constitutional grant of judicial power, and upon the Acts of Congress passed in pursuance thereof; and if neither the Constitution nor the Acts of Congress has prescribed a particular limitation to a power conferred in unrestricted terms, such limitations should not be interposed by judicial construction."

Notwithstanding the opinions thus expressed, the decision in *Allen* v. *Newberry*, or that in *Maguire* v. *Card*, would have been followed in a case of precisely the same character; and although subsequent cases have certainly furnished very strong additional reasons for rejecting the authority of at least one of those decisions, it is not intended to intimate that they would not now be followed in like cases. It is sufficient to say that the case now under consideration is distinguishable from both. The case of *Allen* v. *Newberry*, which is, in other respects, most like the present, not having arisen upon tide-water, it is probable that it was for that reason held to be excluded from the jurisdiction of the admir-

alty by the Act of 1845. And several cases reported since the decision in the case of *The Great Western* have furnished additional and entirely sufficient reasons for declining to apply the doctrines, apparently deducible from the decisions in *Allen* v. *Newberry*, and *Maguire* v. *Card*, to this case. The cases which justify this course will now be referred to.

In a case of collision against the propeller *Commerce*, decided by the Supreme Court, in December Term, 1861, (1 *Black*, 578,) Mr. Justice Clifford, in delivering the opinion of that court, and in answer to an objection that the court had no jurisdiction because it did not appear that the propeller was engaged in foreign commerce, or in commerce between the States, said: "Admiralty jurisdiction was conferred upon the Government of the United States by the Constitution, and in cases of *tort* is wholly unaffected by the considerations suggested in the proposition." He also said: "When the District Courts were organized, they were authorized by Congress to exercise exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burden, within their respective districts, as well as upon the high seas. That provision of the judiciary Act remains in full force and unrestricted as applied to the navigable waters of the Hudson, and all the other navigable waters of the Atlantic coast which empty into the sea, or into the bays and gulfs that form a part of the sea. All such waters are, in truth, but arms of the sea, and are as much within the admiralty and maritime jurisdiction of the United States as the sea itself."

Mr. Justice Clifford, in the case of *The Emma Johnson*, decided by him in the Circuit Court for the Massachusetts District, (1 *Clifford's C. C. Rep.*, 633,) had previ-

ously asserted the jurisdiction of the admiralty in a suit brought upon a contract of affreightment from Boston to Chatham, both being ports of Massachusetts, when a part of the voyage required for its performance was to be made upon the high seas; and he evidently was not inclined to apply the doctrines of *Allen* v. *Newberry* and *Maguire* v. *Card* to other than parallel cases.

In 1866, in the case of *The Owners of the Mary Washington* v. *Ayers*, (14 *Am. Law Reg.*, p. 692,) Mr. Chief Justice Chase, after citing and considering the cases of *The New Jersey Steam Navigation Company* v. *The Merchants' Bank*, *The Genesee Chief*, and *Allen* v. *Newberry*, overruled an objection to the jurisdiction in a case like the present. The libel in that case was upon a contract of affreightment, to be performed on tide-waters wholly within the State of Maryland; and the case may, therefore, be considered as in all respects like the present, so far as this question of jurisdiction is concerned. It was heard by the Chief Justice on an appeal from the District Court, and was doubtless fully argued by counsel and deliberately considered by the Court. In a carefully prepared opinion, the Chief Justice affirmed the jurisdiction, notwithstanding the cases of *Allen* v. *Newberry* and *Maguire* v. *Card*.

In the December Term of the same year, in the case of *The Hine* v. *Trevor*, (4 *Wallace*, 555,) the Supreme Court of the United States, through Mr. Justice Miller, declared that the "admiralty jurisdiction, to which the power of the Federal judiciary is by the Constitution declared to extend, is not limited to tide-water, but covers the entire navigable waters of the United States;" that "the jurisdiction of admiralty causes arising on the interior waters of the United States other than the lakes and their connecting waters, is conferred by the Act of September 13th, 1789,"—the judiciary Act already referred to; and it necessarily follows that in this case the Court has the broad and unrestricted jurisdiction conferred by that Act.

In the case of *The Vanderbilt*, in December Term, 1867, the Supreme Court affirmed the decree of the Circuit Court, awarding to the libellants the damages sustained by them in a collision upon the Hudson, opposite the city of Troy, and no objection to the jurisdiction appears to have been suggested, either by the counsel or by the Court.

In the case of *The Brooklyn*, (2 *Ben.* 547,) the learned Judge Blatchford, of the Southern District of New York, not only stated it to be the settled law and practice of the District and Circuit Courts of that District to maintain the jurisdiction in cases of *tort*, arising out of the purely internal commerce of the State upon the tide-waters of the Hudson river, like those in which it had formerly been denied by Mr. Justice Nelson under the authority of *Allen* v. *Newberry*; but he also stated that he knew that that learned Justice did not adhere to the views expressed by him in the cases of *tort* in which he had denied such jurisdiction. Indeed, the decision of the Supreme Court in the cases of *The Commerce* and *The Vanderbilt* place the jurisdiction in such cases beyond further question.

The jurisdiction of the admiralty in all cases of maritime *tort*, arising upon the tide-waters of the Hudson, being thus firmly established, it is hardly possible that the jurisdiction in this case would not be upheld by the Court of last resort. As before stated, the contract of affreightment, out of which this suit has arisen, in its subject-matter and in its whole extent and character, was exclusively maritime; its performance required maritime service only; it was to be performed wholly within the ebb and flow of the tide; and the negligence charged as the cause of the damage for which the suit is brought, is likewise of a purely maritime character.

Any action for a marine *tort* committed on the vessel while engaged in the performance of the contract—from the time the first cask of sugar or chest of tea was put

on board, until the last was landed—no matter in what part of her voyage it was committed, would have been within the jurisdiction of the admiralty; and it is impossible, in my judgment, to sustain by any principle of law or of reason, the jurisdiction of the admiralty in such cases of *tort*, and at the same time to deny it in a case like the present.

To uphold the distinction sought to be maintained in this case, would require a Court of Admiralty which recognizes no common law forms of action, to maintain its jurisdiction in a case brought by a shipper, against the owners of the Leonard as common carriers for hire, for negligence in the carriage of goods entrusted to their care, when the negligence charged was by proper allegations made the technical basis of the libellant's demand, and to deny it under the same state of facts appearing upon the hearing, if the formal and technical allegations of the libel (though in substance the same) made the contract to carry, and its non-performance, the basis of the alleged right of recovery.

The conclusions stated render it unnecessary to consider the point made by the libellant's counsel, that the *gravamen* of the claim against the *Leonard* was negligence, and that the action might therefore be properly considered as founded upon a marine *tort*, and consequently within the jurisdiction of the admiralty under the cases of *The Commerce*, *The Brooklyn*, and *The Vanderbilt*.

Upon the whole case I do not doubt that the jurisdiction should be maintained.

Southern District of New York,

JUNE, 1869.

THE BRIG BIRDIE AND HER CARGO.

SALVAGE.—CORPORATION.—CONCEALMENT.

Where a brig was driven ashore, on the south side of Long Island, and the officers of a corporation in New York city, incorporated for wrecking purposes, heard of the fact, but concealed their knowledge of it, and, not having at hand any tug of their own, chartered another tug, at $12 per hour, without telling her owners the service for which she was required, and sent their agents on her to the brig, and they were unable to get her off by the means which they then had, and had to send for another tug belonging to the corporation, and, after her arrival, got the brig off, and brought her to New York, and libels were filed, both by the corporation and by the owners of the chartered tug, to recover salvage:

Held, That the corporation should be awarded compensation for the use of their own tug at the rate of $15 an hour, and that the owners of the chartered tug should be awarded compensation at the rate of $12 an hour;

That the conduct of the superintendent of the company, in concealing the fact of the brig's being ashore, was to be reprehended.

THESE were two libels for salvage, one filed by the Coast Wrecking Company, a corporation incorporated for wrecking purposes, and one filed by John Clough and others, owners of the steam-tug William Fletcher, against the brig Birdie and her cargo.

The libel of the Coast Wrecking Company alleged, that, on the 3d of March, 1868, the brig Birdie, which, with her cargo of flour, was worth about $30,000, went ashore on the south side of Long Island; and that the company, hearing of the wreck, dispatched two steam-tugs to her, on the 4th of March, which reached her about 9 P. M. of that day, finding her deserted, and got her off about 9

o'clock the next morning, and brought her to New York, for which service the libel prayed compensation.

The libel of the owners of the Fletcher set up substantially the same facts.

The answer of the owners of the brig and her cargo averred, that the brig was driven ashore by the ice, and her master left her, on March 4th, to get assistance, returning to her that night; that, while he was away, the officers and crew left her temporarily, on account of the intense cold, and had not deserted her; that the Coast Wrecking Company knew, on the morning of March 4th, that the brig was aground, but concealed the fact from others engaged in the business, in the hope of making more profitable arrangements for getting her off, and employed the Fletcher, without disclosing to her owners the object for which she was wanted; that such owners had other and better means of getting vessels off, which they would have dispatched to the assistance of the brig, if they had known her situation; and that, but for such concealment, the brig would have been got off before she was.

For the Coast Wrecking Company, *C. A. Hand.*

For Clough and others, *Beebe, Donohue & Cooke.*

For claimants, *G. M. Speir.*

BLATCHFORD, J. I award to the Coast Wrecking Company, for the services of their steamer, the Relief, in towing the brig from off the place where she grounded and to New York, the sum of $240, being $15 per hour for the sixteen hours during which she was employed in the service, from five o'clock in the afternoon of one day, until nine o'clock in the morning of the next day. I cannot forbear, however, remarking upon the very reprehensible conduct of the superintendent of the libellants, in obtaining information that the brig was ashore,

and studiously concealing it from all persons, so as to endeavor to make it impossible for any but the libellants to render her any assistance. His motive in doing so is shown in the fact that, on his way down to the brig, he told the captain of the hired tug, which was conveying him, that he was afraid that the captain of the brig had come to the city after the rival company, the Atlantic Submarine Wrecking Company, and that he wanted to reach the brig first. When he reached the brig, he found that it required two tugs, instead of one, to pull her off, and he was obliged then to go after the libellants' tug, and thereby lost six hours of time. It is in evidence that other adequate tugs might have been procured in the city, to go to the relief of the brig, if it had been known that the brig was ashore. The libellants and their superintendent, and they alone, so far as appears, knew the fact, and they studiously concealed it, with the view, as it would seem, not that the vessel should be promptly relieved, but that she should not be relieved unless they relieved her. And this they did, when they had no tug of their own in the city, and none, so far as appears, nearer than Fire Island, forty miles outside of Sandy Hook, and fifteen miles beyond where the brig was, and when they were obliged to hire a tug to carry their superintendent to the brig, and when their services were volunteered and not solicited, they having obtained their information by means of a telegraph of their own from the coast. In view of all these facts, I have had serious doubts whether I ought not to dismiss the libel; but, as the case is one of work and labor, it must be paid for at the proper rate. That rate is, I think, on the evidence, $15 per hour. There was no risk or exposure, or hazard to life or property, beyond what occurs in an ordinary towage service. As the libellants claim no particular sum in their libel, and as the answer denies that anything ought to be paid, I cannot withhold costs from the libellants.

Let decrees be entered in favor of the Coast Wrecking Company, for $240, with costs; and in favor of Clough and others, for $288, (being at the rate of $12 an hour for the twenty-four hours during which their tug was employed in rendering service to the brig,) with costs.*

JUNE, 1869.

THE STEAMSHIP VILLE DE PARIS.

Bill of Lading.—Delivery of Cargo.—Pleading.—Evidence.

A case of goods, being one of three specified in a bill of lading, was put over the ship's side, upon the wharf, and placed on a truck belonging to the ship, and wheeled by an employee of the ship up the wharf to the door of a little house, in which the Custom-House inspectors, who had charge of the discharging of the vessel, transacted their business, and there one of the inspectors marked it "P. S." (which indicated that it was to be taken to a public store,) and it was then wheeled farther up the wharf, but what was done with it after that did not appear, although it was in the course of business for it to be deposited in a part of the wharf designated for such goods as were to go to a public store, but it could not be found when search was made for it half an hour after, the wharf being exclusively occupied by the owners of the ship, and being enclosed on the inner end by a fence, access through which was had by gates. On a libel being filed against the ship for the non-delivery of the case according to the bill of lading:

Held, That the facts did not constitute any delivery of the case on the wharf, or to the Custom-House authorities, so as to exonerate the vessel from her liability under the bill of lading.

Where a libel was filed by the consignee named in a bill of lading, to recover damages for non-delivery of the goods, and the libel contained no averment that the libellant was the owner of the goods, and the answer set up that the goods were delivered, but did not allege that the libellant was not the owner of them, or contain any exception to the libel for not averring ownership in the libellant:

Held, That, on these pleadings, the point that the libellant was not the real owner of the goods, must be taken as having been waived.

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* The Circuit Court, on appeal, awarded $1,200 to the Coast Wrecking Company. (7 *Blatchf. C. C. R.*, 238.)

The Steamship Ville De Paris.

The fact that the libellant, on October 24th, 1867, on the entry of the goods at the Custom-House, made oath that the goods then belonged to a house in Switzerland, is not evidence to show that the libellant did not own the goods when the libel was filed, on December 27th, 1867.

BLATCHFORD, J. This is a libel filed to recover the sum of $4,500, as the value of a case of silks carried by the steamship Ville de Paris from Havre to New York, under a bill of lading wherein the libellants, Adolph Rusch and others, were named as the consignees of the case. The libel is founded on the non-delivery of the case under the bill of lading. It does not aver that the libellants were or are the owners of the goods. The only defence set up in the answer is, that the case was delivered to the libellants at New York. There is, in the answer, an allegation, that the libellants are not entitled to recover anything from the vessel, but there is no averment in it that the libellants were not the owners of the merchandise, nor any exception in it to the libel, for want of an averment in the libel that the libellants are or were such owners. On the trial, the claimants took the point that they had a right to rebut the *prima facie* title which the libellants showed as consignees under the bill of lading, (*Lawrence* v. *Minturn*, 17 *How.*, 100, 107,) by showing that the libellants were not the owners of the merchandise in question, and therefore not entitled to bring the suit. I think, however, that, on the above state of the pleadings, the point must be regarded as having been waived by the claimants. But, even if it were open to them, they gave no proof of non-ownership by the libellants, when the suit was brought. The only testimony they introduced bearing on the subject, was the oath, made by one of the libellants, on the entry of the goods at the Custom-House in New York, on the 24th of October, 1867, after the vessel arrived there, that the goods then belonged to a house in Switzerland. The libel was sworn to on the 27th of December, 1867, and filed on the same day, and no evidence was offered by

the claimants to show that the libellants did not then own the goods.

The case in question was one numbered 170. The bill of lading covered two other cases, numbered 169 and 171. The libellants entered all three of the cases, and paid the duties on them, and obtained from the Custom-House a permit, authorizing the delivery to them of the cases numbered 169 and 171, and requiring the case numbered 170 to be sent to the public store for appraisement. That permit was addressed to the inspector of the port, and was delivered to two customs inspectors who had charge of the discharging of the vessel, and transacted their business in a small movable house on the wharf at which the vessel was lying. The case numbered 170 was delivered over the ship's side by its employees, and placed from its tackles upon a hand-truck belonging to the ship, and was then wheeled by an employee of the ship to the door of the movable house referred to, which stood at a point between the ship's gangway and the inner end of the wharf. The employee stopped, with the truck having the case upon it, in front of the inspectors, who were at the door of the house, and submitted the case to their view. One of them placed upon it the letters "P. S.," with chalk, and it was then wheeled away on the same truck, by the same employee of the ship, further towards the inner end of the wharf, and further from the ship than the house. So far as appears, it has never been seen or heard of since. Its deposit upon the wharf from the truck is not shown. The letters "P. S." indicated that it was to be taken to a public store, and it was in course for the truckman to deposit it at a particular place on the wharf which the inspectors had previously designated as a place for the aggregation of such packages as were to be taken to a public store. It was not found at that place. Search was made for it about half an hour afterwards, but it could not be found. The other two cases, which came out of the ship at other

times, and were wheeled separately on other trucks to the inspectors' house, and were there marked by them each with a cross, to denote that they were to be delivered to their consignees, were afterwards found at their proper place of deposit on the wharf, which was a different place from that where the case numbered 170 ought to have been deposited, and were received by the libellants. The wharf was exclusively occupied by the claimants, and was enclosed on the inner end of it by a fence, access through which was had by gates.

These facts do not constitute any delivery of the case on the wharf, or any delivery of it to the Custom-House authorities, so as to exonerate the vessel from her liability under the bill of lading. There must be a decree for the libellants, with costs, and a reference to compute the damages.

Henry H. Anderson, and *Thatcher M. Adams*, for the libellants.

Charles Donohue and *Walter L. Livingston*, for the claimants.

JUNE, 1869.

THE STEAMSHIP THAMES.

Bill of Lading.—Delivery of Cargo to Wrong Person.—Parties.—Cashier.

Where a shipper of cotton in Savannah, on a vessel bound to New York, received for it a bill of lading, specifying that it was to be delivered to order, and drew a draft on B., V. P. & Co., a firm in New York, which he sold to a bank in Savannah, on the faith of the bill of lading as security for its payment, and endorsed the bill of lading to S., the cashier of a bank in New York, to which

the draft was sent for collection, and the agent of the vessel in Savannah made a memorandum on the ship's copy of the bill of lading, that the cotton was to be delivered to B., V. P. & Co., and, on the arrival of the ship in New York, the bill for the freight on the cotton was sent to B., V. P. & Co., and the cotton was delivered to them on their request and on their endorsement of the ship's copy of the bill of lading, without any inquiry after the other copies of it, and no notice was ever given to S. of the readiness of the ship to deliver the cotton, and, the draft not being paid, he libelled her upon the bill of lading:

Held, That the agents of the ship in Savannah were guilty of negligence in putting such a memorandum on the bill of lading, and the agents in New York were negligent in delivering the cotton without the production of the other copies of the bill of lading;

That the libel was properly filed in the name of S.;

That, as the value of the cotton was more than the draft, the libellant was entitled to a decree against the ship for the amount of the draft and interest from its maturity.

THIS was a libel, filed by B. Seaman against the steamship Thames, to recover damages for the non-delivery of one hundred and eleven bales of cotton. The libel alleged that the cotton was shipped on board the Thames, at Savannah, by one Gilbert S. Van Pelt, to be carried to New York; that three bills of lading were signed, two of which were delivered to Van Pelt, and were afterwards assigned by him to the libellant; and that the ship had failed to perform them, and had refused to deliver the cotton to the libellant. A copy of the bill of lading was attached, which acknowledged the receipt of the cotton from Van Pelt, and agreed to deliver it "unto order, or to his or their assigns." The bill of lading was endorsed: "Deliver B. Seaman, cashier, or order. G. S. Van Pelt."

The answer alleged, that Van Pelt was a member of the firm of Bennett, Van Pelt & Co., of New York; that he had made frequent shipments of cotton to that firm, by the line of steamers of which the Thames was one; that this cotton was shipped for that firm, and was agreed to be delivered to them, and was so delivered without notice of any other claim; and that the libellant only held the bill of lading under some arrangement for

advances made on the obligation of the firm, which became insolvent after the cotton had been delivered to them, and before any demand for it had been made on the ship by the libellant.

It appeared, that the libellant was cashier of the Fourth National Bank of New York, to which a draft of G. S. Van Pelt on Bennett, Van Pelt & Co., for $8,300, had been sent by the Atlanta National Bank, with this bill of lading as security. The circumstances of the transfer of the bill of lading by Van Pelt were in dispute on the evidence.

For libellant, *John E. Parsons.*

For claimants, *William Allen Butler.*

BLATCHFORD, J. In this case, I think that the plaintiff became the *bona fide* holder, in trust for the Atlanta National Bank, for a valuable consideration, without notice, of the bill of lading of the cotton, and that he held it as collateral security for the payment of the draft on Bennett, Van Pelt & Co., and not as collateral security merely for the acceptance of that draft. The two bills of lading delivered to Gilbert S. Van Pelt, the shipper of the cotton, engaged to deliver the cotton to "order," and were duly endorsed by him, as the shipper therein named, to the libellant. The draft drawn by Gilbert S. Van Pelt on Bennett, Van Pelt & Co., was made payable to the order of the libellant, at the request of the agents in Savannah of the Atlanta Bank, who purchased it for that bank with the money of that bank, on the faith of the bill of lading as security for its payment. The agents of the vessel in Savannah were guilty of great negligence in putting upon the copy of the bill of lading which they retained and furnished to the purser of the ship, words to the effect that the cotton was to be delivered to Bennett, Van Pelt & Co. On the strength

of this the purser made out the bill for the freight to that firm, and sent notice of the arrival of the cotton to that firm, and caused the vessel to wrongfully deliver the cotton to that firm. And the agents of the ship in New York were guilty of even grosser negligence in delivering the cotton to Bennett, Van Pelt & Co. on their request, and on their endorsement of the ship's copy of the bill of lading, without inquiring after, or demanding the production of, the other two copies of the bill. The whole transaction appears, on the evidence, to have been a well contrived and successful scheme of fraud on the part of the two Van Pelts, one in Savannah and the other in New York, to obtain possession of the cotton without paying anything for it, and they were aided in this by a negligence on the part of the agents of the ship in both places, for which the ship is responsible, and without which the fraud could not have been consummated. The title to the cotton passed to the libellant by the endorsement to him of the bill of lading, to an amount, as between him and the vessel, sufficient to pay the draft, and a delivery of such cotton to any other person than the libellant was a wrongful delivery, and makes the vessel liable therefor to the libellant. The ship ought to have stored the cotton, at the risk of the libellant, until the bills of lading held by him were produced.

The testimony of Gilbert S. Van Pelt as to the transferring of the bill of lading merely as security for the acceptance of the draft, and that of James C. Van Pelt as to what transpired between him and the libellant in regard to the cotton, are entirely unworthy of credit, and I reject wholly the testimony of both of them. They are manifestly swearing to carry through the fraud they devised.

There was no laches on the part of the libellant. The ship arrived on Sunday, and, on the next day, the agents of the ship gave to Bennett, Van Pelt & Co. an order to receive the cotton from the ship, and on the

latter day and the day following they received it. The ship never gave any notice to the libellant to receive the cotton, or that it was ready for delivery. This was a delivery to the wrong party, without affording to the proper party any opportunity to take his property.

Although the *cestui que trust* is the Atlanta National Bank, the suit is properly brought in the name of the libellant, who holds the legal title, as trustee, to the cotton and the draft. The fact that the draft and the endorsement of the bill of lading run to him by the name of "B. Seaman, cashier," do not make it necessary that, because he is, in fact, the cashier of the Fourth National Bank of New York, the suit should be brought in the name of that bank.

As the value of the cotton, less the freight on it, is admitted to have been more than the amount of the draft, there must be a decree for the libellant for the amount of the draft, $8,300, with interest from its maturity, February 19th, 1868, with costs.*

JUNE, 1869.

IN THE MATTER OF HENRY E. DIBBLEE, DAVID P. BINGLEY AND JOHN J. KRAUSS, INVOLUNTARY BANKRUPTS.

ACT OF BANKRUPTCY.—INSOLVENCY.—JUDGMENT.—PREFERENCE.—FIDUCIARY DEBT.—ORDINARY COURSE OF BUSINESS.—CONSTRUCTION OF STATUTE.

One member of a firm, composed of three persons, which was indebted to I. & Co., gave them a confession of judgment on February 25th, 1869. I. & Co. kept the confession till April 30th, 1869, when they filed it, entered judgment for $54,105, and issued execution to the sheriff, who, on the same day, went to the

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* This decision was affirmed by the Circuit Court, on appeal. (7 *Blatchf. C. C. R.*, 226.)

store of the debtors and levied on their goods, and remained in possession till about 10 P. M. of the next day, when a transfer of $46,000 of accounts, bills receivable, and other securities, was made to I. & Co., in payment of the debt. On the morning of April 30th, before the sheriff came, one of the firm paid $2,000 to K., upon a fiduciary debt of $4,000, and the next day, while the sheriff was in possession, he gave K. $2,000 worth of securities to pay the rest of such debt:

Held, That the giving of the confession of judgment did not, of itself, raise a presumption that the firm was insolvent when it was given;

That if, at the time the sheriff appeared with the execution, the firm were unable to pay their debt to I. & Co., in the ordinary course of business, they were insolvent, within the meaning of the bankruptcy Act;

That the ordinary course of business does not mean an ability to turn out goods or other property to pay one debt, without leaving in the debtor's hands assets to provide for other debts as they become due;

That if a debtor, at any time, from the state of his circumstances, contemplates that he will not be thenceforth able to pay his debts as they mature, in the ordinary course of business, he contemplates insolvency;

That if a debtor, knowing that a debt is past due, and being insolvent or contemplating insolvency, refrains from going into voluntary bankruptcy, and his property is taken on legal process, the debtor suffers his property to be taken on legal process;

That if the taking of the property of the firm by the sheriff had the necessary effect to give to I. & Co. a preference, which they would not have had otherwise, and if the firm, being insolvent or contemplating insolvency, suffered its property to be taken on that execution, they intended, in law, to give the preference which the taking of the property conferred;

That if the transfer of the 1st of May put I. & Co. in a better position, as to their debt, than they occupied by reason of their levy, that gave them a preference which the law forbids;

That the fact that the confession of judgment was signed by only one member of the firm, did not impair the effect of the judgment in determining the question of bankruptcy;

That the fact that the debt to K. was a fiduciary debt, was not of consequence, nor was the fact that K. pressed for payment of it.

All the words of a statute must be construed in such manner as to give them force and effect.

Every one is supposed to intend the natural consequences of an act committed by him.

Neither the question whether the property, the transfer of which is alleged to have been an act of bankruptcy, shall be retained by the creditor to whom it was transferred, nor the question whether the bankrupt shall receive his discharge, will be affected by the verdict of the jury on the question whether an act of bankruptcy has been committed.

THIS was a proceeding in involuntary bankruptcy. The petition was filed by the firm of Garrett, Clark &

Co., against the firm of Henry E. Dibblee & Co., of the city of New York, and alleged four acts of bankruptcy:

(1.) That, on or about the 25th of February, 1869, the debtors, being insolvent and in contemplation of insolvency, gave to A. Iselin & Co. a warrant to confess judgment, and did procure and suffer their property to be taken on legal process, in favor of A. Iselin & Co., and that, on April 30th, 1869, said judgment was entered in the Supreme Court of the State, for $54,105, and execution was issued on it, and the debtors' goods levied upon, and that this was done with intent to give a preference to Iselin & Co., and to defeat and delay the operation of the bankruptcy Act;

(2.) That the debtors, being insolvent and in contemplation of insolvency, made a payment of money to Iselin & Co., with intent to give them a preference as creditors;

(3.) That, on the 1st of May, 1869, the debtors, being insolvent and in contemplation of insolvency, made a transfer to Iselin & Co. of property amounting to about $46,000, with intent to give them a preference as creditors, and with intent to defeat and delay the operation of the Act;

(4.) That, in April, 1869, the debtors, being insolvent and in contemplation of insolvency, made a payment of $4,000, in money and bills receivable, to the wife of John J. Krauss, with intent to give a preference to her.

The bankrupts took issue on the petition, and the case was tried before a jury. On the trial the following facts appeared. The defendants gave the confession of judgment on the 25th of February. It was at that time delivered to Mr. Iselin. He kept it in his possession, or under his control, until the 30th of April. He then took it to the proper officer, and a judgment was entered up upon it for $54,105, and an execution was immediately issued on the judgment, to the sheriff of the city and county of New York. On the same day, the sheriff went

to the store of Dibblee & Co. with the process, and made a levy on their goods, and took possession of such goods, to hold them, to be administered by the State Court and applied upon the judgment. The sheriff remained in possession of the property during the remainder of that day—the 30th day of April—and all through the next day, which was the 1st of May, until about ten o'clock in the evening of the latter day, when a transfer of $46,000 worth of accounts, bills receivable, and other securities, was made by the three debtors, to Iselin & Co., in absolute payment and extinguishment of their debt. With the extinguishment and payment of the debt, the judgment and execution fell to the ground, the transfer of securities having been accepted by Iselin & Co. as a payment of the debt.

The facts in regard to the Krauss matter were as follows: On the morning of the 30th of April, before the sheriff came with the execution, Mr. Dibblee paid to Mr. Krauss, for Mrs. Krauss, $2,000 in money, on a debt of $4,000 due to her. During the next day, the 1st of May, while the sheriff was in possession under the execution, and before the making of the transfer of securities to Iselin & Co. on the evening of the 1st of May, Dibblee handed over to Mr. Krauss $2,000 worth of securities, to pay up the balance of the debt of $4,000 due to Mrs. Krauss.

For petitioning creditors, *C. H. Smith.*

For bankrupts, *A. R. Dyett.*

JUDGE BLATCHFORD charged the jury as follows:

This case, gentlemen, is one involving principles of very great importance under the bankruptcy Act. The general features of that law, and the objects which Congress had in view in enacting it, are undoubtedly very well understood by you, as business men, engaged

in the daily avocations of life. The counsel for the petitioning creditors, in summing up, has stated very aptly and clearly the objects which the bankruptcy law contemplates, and intends to carry out, in destroying the system that had previously obtained, by which failing debtors were enabled to prefer whom they pleased as their creditors, such preferences taking different forms—in some cases, chattel mortgages; in other cases, judgments; in others, the turning over of securities; and the numerous other forms in which creditors could be preferred by insolvent debtors. To such debtors the bankruptcy law says, in explicit language—"You must not make these preferences, but you must give all your property up to be distributed equally among your creditors."

In this case there are, in the petition, four different acts of bankruptcy charged. The first one is, that, on the 25th of February, 1869, the three debtors, Dibblee, Bingley & Krauss, composing the firm of H. E. Dibblee & Co., being insolvent, gave to Iselin & Co. a warrant to confess judgment, and procured and suffered their property to be taken on legal process. Although the petition is so drawn as to state the fact that, on the 25th of February, the debtors, being insolvent, gave to Iselin & Co. a warrant to confess judgment, and suffered their property to be taken on legal process, the evidence is, that no property was taken on legal process until the 30th of April. But the same allegation of bankruptcy goes on to state, that, on the 30th of April, 1869, said judgment was entered in the Supreme Court of the State of New York, and a judgment roll was filed for $54,105, and execution was issued thereon against the property, &c. It appears, therefore, that the statement in regard to suffering the property to be taken on the 25th of February, is a clerical error, the substance of the averment being, that the debtors gave a confession of judgment on the 25th of February, when insolvent, and, on

the 30th of April, when also insolvent, suffered the property to be taken under an execution issued on that judgment.

Now, so far as the giving of the warrant on the 25th of February is concerned, there is no evidence in the case upon which you could safely base any verdict that, at that time, the debtors were insolvent, or contemplated insolvency; and the case has not been tried upon that idea. The transactions of the 30th of April, and of the 1st of May, are the transactions to which your attention is to be directed. For aught that appears, notwithstanding a confession was given on the 25th of February, there was no insolvency at that time, and no contemplation of insolvency; because, the giving, as security, of a warrant to confess judgment, on which the creditor might enter a judgment at any time, by no means, of itself, raises any presumption of insolvency.

To come, then, to the transactions of the 30th of April and the 1st of May, the averment is, that, on the 30th of April, these three debtors, being insolvent, or in contemplation of insolvency, suffered their property to be taken on this execution, with intent thereby to give a preference to the Iselins, and with intent, by such disposition of their property, to defeat and delay the operation of the Act. On that subject the Act is very explicit. The question you are to try is solely, whether Dibblee, Bingley and Krauss shall be adjudged bankrupts, by reason of any acts which they committed or suffered. You are not now, in any manner, trying the question whether Iselin & Co. shall be compelled to refund what they received, or whether Mrs. Krauss shall be compelled to refund the money and securities which she received. These questions are not at all involved here. If these debtors shall be declared bankrupt, and an assignee shall be appointed, and he shall bring an action against Iselin & Co. and an action against Mrs. Krauss, nothing that has transpired here—neither your verdict nor the adjudi-

cation of the Court, if your verdict should be in favor of the creditors—will in any manner whatever determine or affect any question that will be involved in any such suit. Nor will your verdict in any manner affect the debtors on the question of their discharge in bankruptcy. If they shall be put into bankruptcy, and shall hereafter apply to be discharged, and no one of their creditors shall choose to oppose them, and they shall take the oaths which the law requires, they will be discharged, notwithstanding they may be adjudged bankrupts in this proceeding. Therefore, the case is stripped of all questions as to the discharge of the bankrupts hereafter, and of all questions as to the right of Iselin & Co. and of Mrs. Krauss to hold what they received.

In regard to Iselin & Co., I state this further proposition, that, to put a debtor into bankruptcy, for such causes as are alleged as the first ground of bankruptcy in the petition in this case, it is only necessary that the intent spoken of should have existed on the part of the bankrupt. If Iselin & Co. had, at the time they took a preference, if they did take one, no reasonable ground to believe that the debtors were insolvent, they cannot be compelled to pay back what they received, notwithstanding the debtors were, in fact, insolvent, and notwithstanding the debtors knew they were insolvent, and notwithstanding the debtors intended to prefer Iselin & Co. Therefore, the sole question is, whether these debtors shall be adjudged bankrupt, so that their estate shall be administered by this Court, in bankruptcy, and nothing is involved in regard to the title of Iselin & Co. or of Mrs. Krauss to what they received, or in regard to the right of the debtors to receive their discharges hereafter from the Court. I say this for the purpose of disabusing your minds of any impression they may have received from the remarks made by counsel.

The statute provides, that if any debtor, being insolvent, or in contemplation of insolvency, makes any

conveyance or transfer of property, or money, or suffers his property to be taken on legal process, with intent to give a preference to one or more of his creditors, or with intent, by such disposition of his property, to defeat or delay the operation of the Act, he commits an act of bankruptcy, for which this Court may take his property and treat him as a bankrupt. In this, there are, as you perceive, several ingredients. In the first place, the debtor must either be insolvent, or contemplate insolvency. In the second place, he must make a conveyance or transfer of money or property, or he must suffer his property to be taken on legal process. In the third place, he must do this with the intent, on his own part, to give a preference to the creditor, or with the intent, on his own part, to defeat or delay the operation of the Act.

The first question for your consideration, gentlemen, is, whether, at the time this property was taken by the sheriff on legal process, on the 30th of April, Dibblee and his firm were insolvent or contemplated insolvency. So far as concerns the financial transactions of the firm, Dibblee appears to have been the firm, and I shall treat him as the firm for the purposes of this case, because the other debtors appear to have been merely salesmen. Now, at the time the sheriff came with his process, on the 30th of April, to take this property, the firm owed Iselin & Co. this debt. It was past due. Iselin & Co. appear to have had a right to enter judgment, and this debt appears to have been legally due at any time after the 25th of February, although there may have been some understanding that judgment should be withheld for thirty days. At all events, the debt had been over due for more than thirty days at the time the sheriff arrived. So far as appears, it was the only debt then due. But, one overdue debt is sufficient to put a party in the condition of owing a debt which he is unable to pay. If, at the time the sheriff appeared with the execu-

tion, to levy on the stock of goods, the firm owed this debt to Iselin & Co., and were unable to pay it in the ordinary course of their business, they were then insolvent, in the language of the bankruptcy Act, and within its meaning. No matter how many other debts there were, not yet due, if they were unable to pay that debt, in the ordinary course of their business, they were insolvent. The "ordinary course of their business" does not mean an ability to turn out goods, or bills receivable, or assets or securities, to pay that one particular debt, at the same time leaving other debts, which are certain to become due, unprovided for, and not leaving sufficient assets in the hands of the debtors to meet them when they become due. It is not in the ordinary course of business for a party who has a store of goods and other securities, and owes a matured debt, to turn out a large portion of those goods, or to take the most valuable of his securities, and turn them over to the creditor, to extinguish that debt, if sufficient assets do not remain to pay the rest of his debts, in the ordinary course of his business. That is an extraordinary course of business, and not the ordinary course of business. Therefore, if, when the sheriff appeared to levy on this stock of goods, the firm was not able to pay this debt to Iselin & Co., in the ordinary course of business, it was insolvent. If, at that time, Dibblee, in his own mind, from a view of the state of things which surrounded him, contemplated that his firm would not be, and continue to be, thenceforth, able to pay their debts, as such debts should mature, in the ordinary course of their business, then he contemplated insolvency; and, if he contemplated insolvency, that puts the case in precisely the same predicament as though he had been insolvent, because, the language is, "being insolvent or in contemplation of insolvency." A debtor has no more right to do the forbidden act when he contemplates that, in view of the existing aspect of affairs, he will not be able to pay his debts, in the ordi-

nary course of his business, than if he were actually at the time insolvent. If he contemplates insolvency, it is of the same force and effect as if he were actually insolvent, by reason of his not being able to pay a debt past due at the time.

If you shall find that, at the time the sheriff appeared, Dibblee, or his firm, were insolvent, or contemplated insolvency, you will then pass to the second question. If you find that he and his firm were not insolvent, and did not contemplate insolvency, that disposes of this branch of the case. But, if you find that he or they were insolvent, or contemplated insolvency, then you will inquire —Did they suffer their property to be taken on legal process at that time?

The Act provides, that, if the debtor shall, under the circumstances stated, "procure or suffer his property to be taken on legal process," he shall be adjudged a bankrupt. The word "procure" and the word "suffer" have different meanings. The former is active, and the latter is passive. A man may suffer a thing to be done, when he has the means of doing something other than suffering it to be done, without procuring it to be done. In this case, the debtors knew that the warrant to confess judgment had been given on the 25th of February. They knew that the debt to Iselin & Co. had been past due for at least thirty days. They knew that Iselin & Co. could at any moment enter up judgment on the warrant. And, if Mr. Dibblee, at the time the sheriff came there, or any time prior thereto, was insolvent, or contemplated insolvency, he was in a condition in which the bankruptcy law required him to take proceedings for coming into the bankruptcy Court, and submitting his property voluntarily to the administration of the bankruptcy law; because, in order to enable a person to come voluntarily into the bankruptcy Court, it is only necessary that he should present a petition stating the necessary jurisdictional facts, and averring that he is unable to pay all

his debts in full. If, therefore, Dibblee, at the time the sheriff came there, or at any time previously, knowing of this debt to Iselin & Co., and that it was past due, and being insolvent, or contemplating insolvency, refrained from going into bankruptcy voluntarily, then, in judgment of law, he suffered his property to be taken on legal process; because, if, prior to the entry of that judgment and the issuing of an execution thereon, he had gone voluntarily into bankruptcy, the bankruptcy Court would have taken the property, and the judgment and execution would have had no force or effect to take it. Therefore, in judgment of law, if he omitted to go into bankruptcy, under such circumstances, he suffered his property to be taken on legal process. Unless this construction be given, there is no more meaning to the word "suffer" than to the word "procure." All the words of a statute must be construed in such manner as to give them force and effect.

If you shall find that Dibblee contemplated insolvency, and suffered his property to be taken on legal process, you will then consider the question, whether he did so with intent to give a preference to Iselin & Co., or with intent to defeat or delay the operation of the bankruptcy Act. This intent must be an intent on the part of Dibblee; and, unless Dibblee, at the time, knew that he was insolvent, or contemplated insolvency, he could have no intent to give a preference to one creditor over another. If a person, while paying one creditor, honestly supposes that he is able to pay every creditor, there can be no intent to give a preference. Therefore, if Dibblee did not, at the time, believe he was insolvent, and did not contemplate insolvency, he could have had no intent to give any preference. But, if he was insolvent, or contemplated insolvency, and suffered his property to be taken in this way, then, if the taking of the property by the sheriff had the necessary effect to give to Iselin & Co. a preference which they otherwise would not have had,

Dibblee, in judgment of law, intended to give the preference which the taking of the property conferred and effected; and the burden is thrown on him, Dibblee, to show that he had no such intent, and to make that out to your satisfaction. In law, every one is supposed to intend the natural consequences of an act committed by him.

It is of no consequence that an arrangement was made, originally, to give to Iselin & Co. this preference. The paper signed and given on the 25th of February did not give a preference. It would have amounted to nothing if the judgment had never been entered and the execution had never been issued. The preference was given by the issuing of the execution, followed by the levy, so far as the goods were concerned. Therefore, you have nothing to do with the fact that there was an arrangement made originally, when the money was loaned by Iselin & Co., that they should have this species of security.

On the question of intent, there is the further alternative point, whether there was an intent to defeat or delay the operation of the Act. Very little has been said on that subject, and I think it hardly worth while to call your attention to it, because the whole case turns upon the other branch.

So far, in respect to the Iselin matter, your attention has been directed to the levy by the sheriff. But the Iselin matter has another phase, namely, the transaction on the evening of the 1st of May, in regard to the bill of sale, which transferred securities to Iselin & Co. in payment of their debt. That is a separate and independent transaction, and is made a separate ground, in the petition, for asking to have Dibblee & Co. adjudged bankrupts. All the debtors joined in making the bill of sale. In respect to the confession of judgment, Dibblee appears to have signed it with his individual name, and also with the firm name. The other partners did not

sign it, and appear to have known nothing about it; and I am asked to charge that on that ground it is illegal and void. I do not conceive that this Court has anything to do with that question. If the State Court has permitted the judgment to be entered up against all three of the debtors, and the execution to be issued, I must presume that this was done in the legal and proper way. This Court must treat the record of the State Court as being in due form; and, therefore, although the other partners appear to have had nothing to do with giving the confession of judgment, I must treat the judgment and execution as not being impaired by reason of any defect of that kind.

I now recur to the third alleged act of bankruptcy. It is, that the debtors, on the 1st of May, being insolvent, or in contemplation of insolvency, made to Iselin & Co. a conveyance or transfer of a large number of bills receivable and accounts belonging to the firm, to the value of $46,000, with intent to give a preference to Iselin & Co., and to delay and defeat the operation of the Act. The same elements of insolvency, or contemplated insolvency, enter into this branch of the case, as into the first, and the same remarks are applicable. It is urged, on the part of Dibblee, that, because of the prior levy, no preference was given to Iselin & Co. by this transfer. But, although the levy of the sheriff on the property was in force from the time it was made, on the 30th of April, until the bill of sale was given, and although Iselin & Co. thus had whatever security such levy gave to them, still, if, in your judgment, upon the evidence, the transaction of turning over these securities, by a bill of sale, to Iselin & Co., had the effect of putting them, as creditors, into any better position in respect to their debt than that which they occupied by virtue of the levy on the stock of goods, then it gave to them a preference which the law forbids. If it did not have that effect, then it gave them no preference.

If you shall find that there was such a preference

given by the bill of sale, the next question will be, whether Dibblee, at that time, had the intent to put Iselin & Co. in a better position, by the bill of sale, and thus to give them a preference. Now, all the remarks on the law as to insolvency, or contemplation of insolvency, which I made to you in regard to the state of things which existed when the levy was made by the sheriff, are applicable to this branch of the case. But, in applying the law to the facts of the case, you will bear in mind that, between the time the sheriff came and the giving of the bill of sale, there was a material change in the condition of the firm, which has been stated to you very clearly by Dibblee himself, in his testimony. He states that Iselin's levy destroyed their credit; and that, after that, they could not have gone on; that, when the execution was levied, if they could have gone on in business, he thinks they could have paid their debts in full; but that the levy destroyed their credit, and they could not go on. Therefore, the fact of the sheriff's levy, and that he had taken possession of the store, the necessary publicity, and the consequences which followed it, none of which existed at the instant before the sheriff came there, and all of which existed on the evening of the 1st of May, when the transfer was made by bill of sale, must be taken into consideration by you in determining whether, (if you find that the transfer had the effect of putting Iselin & Co. in a better condition than they were in by reason of their levy,) when the bill of sale was given on the evening of the 1st of May, the firm were insolvent, or contemplated insolvency. Did they, at 10 o'clock on the evening of the 1st of May, the sheriff being then in possession of their goods under a levy, and the matter having become public, believe that they were able to pay the debt of Iselin & Co., in the ordinary course of business, or believe that, if they continued on, in that state of things, they would be able, in the ordinary

course of business, to pay their debts in future, as they should become due, in the ordinary course of business?

This disposes, as I understand it, of all the questions connected with the Iselin matter, which have been called to my attention by the counsel for the respective parties.

The fourth act of bankruptcy alleged is the Krauss matter, which has two phases—the payment of the $2,000 in money, on the 30th of April, and the transfer on the following day, while the sheriff was there, of the $2,000 in bills receivable. The fact that the debt, as between Mrs. Krauss and the firm, was a fiduciary debt, is of no consequence in this case. For the purposes of this case, it was nothing more than an ordinary debt. It stood in no better condition, and the firm had no more right to pay it, than any other debt. Nor does it make any difference that Mrs. Krauss asked for it, and pressed for payment of it. This doctrine has no place under the present bankruptcy Act. That Act recognizes no distinction between the giving of a preference when a creditor asks for it, and the giving of a preference when the creditor does not ask for it, provided the intent exists on the part of the debtor, in giving the preference, that the particular creditor shall have the preference. If, therefore, you shall find that this firm, being insolvent, or contemplating insolvency, paid $2,000 to Mrs. Krauss, on the 30th of April, with intent to prefer her over other creditors, or, on the next day, handed over to her $2,000 worth of securities with that intent, they committed an act of bankruptcy.

If you shall find in favor of the petitioning creditors on any one of the questions which I have submitted to you, they will be entitled to your verdict. It does not require that you should find for them on all those questions; but, if you shall find that any one of the alleged acts of bankruptcy is established to your satisfaction, your verdict will be for the creditors.

The petitioning creditors having withdrawn the second and third acts of bankruptcy alleged in the petition, the jury rendered a verdict in favor of the creditors as to the first and fourth acts of bankruptcy alleged in the petition.

JUNE, 1869.

THE STEAMER VICKSBURG.

COLLISION IN EAST RIVER.—STEAMER AND LIGHTER.—CROWDED RIVER.

A lighter, loaded with casks of oil, was beating down the East river, which was crowded with vessels, the wind being southwest, and the lighter being on her port tack, and a steamer, coming up the river, saw the lighter before she came on that tack, and, on seeing her come about upon that tack, slowed her engine, and afterwards stopped it, but did not reverse it or change her course, and struck the lighter on the bluff of her port bow:

Held, That the fault of the collision was with the steamer, in plunging into the crowd of vessels, taking her chance of finding an opening through them;

That the lighter was entitled to keep her course, and did so, and did nothing to embarrass the steamer, and was not in fault.

BLATCHFORD, J. The libellants, owners of the lighter G. A. Graves, sue the steamer Vicksburg, to recover damages for a collision between the two vessels on the afternoon of the 5th of December, 1867, just before dusk, in the East river, off the Brooklyn slip of the Catherine-street ferry, and about in the middle of the river. The Vicksburg had come around from the North river, and was going through the East river, into the Sound. The lighter was heavily loaded with casks of oil. The wind was from the southwest, and the lighter was beating down against it. The tide was ebb. The river was crowded with vessels. The stem of the Vicksburg struck the lighter on the bluff of her port

bow, and tore out her mast, and damaged her seriously. The lighter was on her port tack, standing from Brooklyn to New York, at the time of the collision. She was seen by the Vicksburg before she came about upon that tack. The Vicksburg slowed to half speed on seeing the lighter come about, and subsequently, before the collision, stopped her engine, but did not reverse or change her course. The fault in the collision was on the part of the Vicksburg. She plunged into the crowd of vessels, taking her chance of finding an opening through them. The lighter was entitled to keep her course, and did so. She made no movement to embarrass the steamer, and did not come about at such a time, or in such a way, as to prevent the steamer from taking the proper measures to avoid her; and the steamer must bear the consequences of not having avoided her.

There must be a decree for the libellants, with costs, with a reference to compute the damages.*

Oscar Frisbie, for the libellants.

Vose & McDaniel, for the claimants.

THE STEAMBOAT PATERSON.

Collision at Pier between Steamboats.—Lookout.—Costs.

A steamboat, whose berth was on the north side of a pier, was unable to get into it, and came to the end of the pier, and, for the purpose of making a landing, was backed down across a ferry slip on the south side of the pier,

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* This decision was affirmed by the Circuit Court, on appeal. (7 *Blatchf. C. C. R.*, 216.)

without any one on her stern to look out, and was run into by a ferry-boat, which was coming into the ferry slip:

Held, That the steamboat was in fault, in thus backing without keeping at her stern a proper lookout, and without paying attention to the approach of the ferry-boat;

That the ferry-boat was also in fault, in not stopping sooner, and in not approaching with greater caution, especially as her pilot saw that there was no one on the steamboat's deck noticing the ferry-boat's approach;

That the damages must be divided, and the libellant should have his costs.

BLATCHFORD, J. The libellant, owner of the steamboat Thomas E. Hulse, brings this suit against the steamboat Paterson, to recover for the damages done to the former vessel by a collision, which took place between them on the morning of the 15th of August, 1867, about eight o'clock. The bow of the Paterson came in contact with the stern of the Hulse, and broke her stern-post, and otherwise damaged her. The Paterson was a ferry-boat, plying on a regular ferry between Christopher street, New York, and Hoboken. The Hulse plied to Fort Lee. Her regular landing place was on the north side of the pier at the foot of Christopher street. The ferry slip of the Paterson was in the basin next south of that pier, the pier projecting into the river some distance beyond the mouth of the ferry slip proper, which latter was formed by racks. The Paterson was on a trip from Hoboken to New York, bound for the said slip. The Hulse had arrived from Fort Lee, with passengers, and, not being able, in consequence of the presence of other vessels, to effect a landing, either on the north side of the pier, or at the end of it, worked herself around the south corner of the end of the pier, with a line out thereto, for the purpose of trying to make a landing, with her bow in, at the south side of another steamboat, which lay at the south side of the pier. This manœuvre of hers was seen by the pilot of the Paterson at a distance of about 600 yards, and he immediately slowed his engine to half speed, and proceeded towards his slip. It is claimed, on the part of

the Paterson, that her pilot saw the line referred to let go, and saw the Hulse move off in a southerly direction, inside of the slip, until her stem had reached a point to the eastward of the western end of the southerly ferry rack, and until he could see a clear path on the port side of the Hulse, for the Paterson to go into the ferry slip. Before that time, the Hulse, on the evidence, had been going first ahead and then backward in the slip, with the design, in fact, of effecting a landing at the south side of the steamboat which lay at the south side of the pier, and with no other design. In pursuance of that design, and while the Paterson was still running ahead at half speed, and when, as claimed on the part of the Paterson, the Hulse was in such a position that the pilot of the Paterson thought that the Hulse was intending to make a landing at a pier that lay south of the southerly ferry rack, the engine of the Hulse was started to move the boat backwards, her stern being towards the Paterson, and the pilot of the Paterson, seeing her coming backwards towards him, immediately stopped and reversed his engine, and it had made two or three revolutions back before the collision, so that the Paterson was going ahead very little, if she was not about dead in the water, at the time of the collision. When the engine of the Hulse was thus started to move her backwards, no attention was paid by her to the approaching Paterson, and no lookout was stationed aft, to see whether something might not be in her way, but she continued to back, until a passenger on board of her notified her engineer that the Paterson was right under the stern of the Hulse, whereupon he stopped the backward motion of the engine, after it had been working back about five turns, and started it in the other direction, and it had turned ahead about three-quarters of a turn, and was turning ahead, at the time of the collision, but the backward motion of the Hulse in the water had not been stopped.

On the above facts, the Hulse was in fault, in backing without keeping a proper lookout at her stern, and without paying attention to the approach of the Paterson. But I think that the Paterson was also in fault, in not sooner stopping and reversing. Notwithstanding the appearance the Hulse may have presented to her pilot, the Paterson ought not to have kept on at half speed as long as she did. The manœuvres of the Hulse were such as to call for greater caution on the part of the Paterson than she exhibited, particularly as her pilot says that he could see no one on the deck of the Hulse noticing the approach of the Paterson.

When the damages are ascertained by a reference, they must be divided. The libellants will be entitled to costs.

C. M. Da Costa, for the libellants.

W. J. A. Fuller, for the claimants.

JUNE, 1869.

THE SCHOONER THOMAS JEFFERSON.

Breach of Charter.—Insufficient Sail.—Running Ashore.—Negligence.—Damages.

A vessel was chartered to bring a cargo of oranges from Havana to New York, and, her sails being insufficient, she lost time on the voyage, and, on arriving off Cape May, put in, in anticipation of heavy weather, and came to anchor, and her master failed to keep a careful watch at night, and, the wind coming around so as to blow on shore, the chain parted and the vessel went ashore, the master's excuse for not dropping another anchor being that ice had formed on his decks, from snow which fell the evening before, so that the second anchor and chain were covered up by ice, and could not be let go. The deck-

load was discharged for the purpose of getting the vessel off, and the vessel was then got off and came to New York, without taking the deck-load on board again, and it was afterwards sent to New York by railroad and there tendered to the charterers, who refused to receive it, (it having been frozen and damaged,) and filed a libel against the vessel, to recover damages for the non-fulfilment of the charter-party:

Held, That the vessel was chargeable with fault in not having her sails in proper condition, whereby the voyage was delayed;

That, the delay of the vessel being a fault, it was to be presumed against her that, but for that delay, she would not have been obliged to run into Delaware Bay, and the disaster there would not have occurred;

That the master was negligent in not keeping a vigilant watch while at anchor, and in not being prepared to drop a second anchor when the chain parted;

That the freezing and consequent injury to the deck-load must, therefore, be attributed to the vessel;

That she was chargeable with the injury to the deck-load, and with any damage sustained by the charterers, by the loss of any portion of her cargo by decay, arising from the delay of the vessel on the voyage.

THIS was a libel filed by Michael Morrow and others, charterers of the schooner Thomas Jefferson, to recover damages for the alleged non-fulfilment of a charter, by which the vessel was to bring a cargo of oranges from Havana. The libel alleged, that the vessel was not properly fitted with sails; that her master did not perform the voyage with proper diligence, and put into Delaware Bay, where, by negligence, he allowed the vessel to be blown ashore; that, having discharged the deck-load, he succeeded in getting the vessel off, but not with proper diligence, and then failed to take on board the deck-load; and that, by the decay of the cargo, consequent upon the delay and the freezing of the cargo, the libellants had been damaged.

The answer denied any delay or negligence, and alleged that all the damage to the cargo was the result of perils of the sea. The evidence tended to show that the master of the schooner lost time on the voyage, by not carrying sail, and that, when the vessel reached Cape May, the weather being threatening, it was determined, with the approval of one of the charterers, who was on board, to put into Delaware Bay, and the vessel anchored

there about nightfall. It came on to snow, which turned to rain, and the wind, about midnight, came out from the northwest and blew heavily on shore, and the weather grew very cold, and about 4 A. M. the chain parted. Efforts were made to let go the other anchor, and to hoist sail, but they were found to be so covered with ice that nothing could be done, and the vessel went ashore. The deck-load was afterwards discharged, and the vessel got off in three or four days, during part of which time the weather continued very cold, and ice made freely. After getting off, the vessel sailed for New York, without taking the deck-load on board again, and it was sent to New York by railroad, where it was tendered to the charterers, who refused to receive it.

For libellants, *Benedict & Benedict.*

For claimants, *John E. Parsons.*

BLATCHFORD, J. The libellants, owners of a cargo of oranges and pine-apples, shipped them at Havana, on the 20th of February, 1868, on board of the schooner Thomas Jefferson, for New York, under a charter-party made of that vessel by the claimants, her owners, to some of the libellants, for a voyage from Havana to New York. The charter-money was duly paid. The charter-party excepted the dangers of the seas and of navigation. The libellants claim that, through fault and negligence on the part of the vessel, arising from the incompetency of her master, and defects in her sails, delays and disasters occurred, which protracted the voyage some eight days, and destroyed some of the fruit, so that it was not delivered to the libellants by the vessel. The answer denies all fault and negligence on the part of the vessel, and avers that, in the prosecution of her voyage, the vessel, by stress of weather and the force of the winds and the waves, was, on the 2d of March, 1868, driven into Dela-

ware Bay, inside of Cape May, where, on the next day, she was, by force of the wind and of the floating ice, driven on shore; that, to float the vessel, it became necessary to send on shore a portion of her cargo of oranges, in a partially frozen condition, from the severity of the weather, which was done; that the vessel was unable to take on board again such portion of her cargo, having reference to the place and circumstances; but that the claimants, as soon as practicable, caused such portion of her cargo to be brought to New York and tendered to the libellants, and that any damage thereto was due to the perils and dangers of the seas, and not to any fault or negligence on the part of the vessel, or of those in charge of her.

I am satisfied that the libellants have made out a case of negligence on the part of the master of the vessel, in respect to the occurrences in Delaware Bay, and of fault on the part of the vessel in having her sails in such poor condition that her master was obliged to heave his vessel to for some considerable time, on several occasions, and to shorten sail on other occasions, because he could not carry the sail which, under the same circumstances of wind and weather, he could have carried, and would have been bound, under the charter of the vessel, to carry, if the sails of the vessel had been in a proper condition. She put into Cape May on the eleventh day of her voyage, at which time, on the evidence, she ought to have been near New York, if not quite arrived there, under ordinary circumstances, if her sails had been in proper condition. It is shown that other vessels carrying full sail were seen outstripping her when she was going under shortened sail. Her delay being a fault, it is to be presumed against her that, but for such delay, she would not have been obliged to run into Delaware Bay, and the disasters there would not have occurred.

Under the circumstances which existed when she put in at Cape May, it was not improper for her to do so.

But the evidence shows that her master was guilty of gross negligence, in not keeping his sails and windlass and his second anchor and chain free from ice, and in not having that anchor and chain in readiness for use, when the chain of the single anchor, with which he had anchored inside of Cape May, parted. If he had exercised proper vigilance in watching the weather and the wind, he could have been prepared to drop his second anchor the moment the chain to the first one parted. Instead of being vigilant he appears to have maintained no competent watch on deck, and to have known nothing himself of the condition of things which he testifies existed on his deck, arising from the change of wind and the sudden cold. Either such condition of things did not exist before the chain parted, and there was not the accumulation of ice on the sails and windlass and second anchor and chain which he now attempts to make out, as an excuse for the non-use of the second anchor, and for the drifting ashore of the vessel, or else he did not watch the formation of the ice, and attempt to check or obviate it. The master being in fault in allowing his vessel to be deprived of the use of her second anchor and chain, her driving on shore, and the freezing of her deck-load of oranges, and their loss by decay consequent thereon, and on their transportation to New York by land, and on the time consumed therein, must be attributed to fault on the part of the vessel. She must, therefore, be held liable for the value of such deck-load, which was wholly lost to the libellants, and which they were not obliged to accept in the condition in which it was tendered to them in New York, and for any legal damages sustained by the libellants, by any loss or decay of any other portion of the fruit, or in respect of any of the cargo of the vessel, arising from the delay of the vessel on her voyage, or from her going on shore at Cape May. I have not at all considered the question of whether the vessel was got off the shore at Cape May as soon as she

might have been with proper diligence, because, inasmuch as the right of action on the part of the libellants was complete when the vessel went ashore, such right would not have been impaired, if the vessel and her cargo had remained there to this day.

There must be a reference to compute the amount of the libellants' damages on the principles above indicated, and a decree for such amount, in their favor, with costs.

JUNE, 1869.

IN THE MATTER OF MOSES DE PUY, ON HABEAS CORPUS.

CONSTITUTIONAL LAW.—POWER OF THE PRESIDENT.—REVOCATION OF PARDON.—DELIVERY.—IMPRISONMENT FOR A YEAR OR LESS.

Under the Constitution and laws of the United States, a pardon must be regarded as a deed, to the validity of which delivery is essential.

A pardon differs in that respect from a commission.

Until a pardon is delivered, it may be revoked.

Under the 3d section of the Act of March 3d, 1863, (13 *Stat. at Large*, 500,) a Court of the United States has no right to order a person who is sentenced to imprisonment for a period of one year or less, to be confined in any particular State prison or penitentiary.

A prisoner was sentenced to imprisonment for a year at Blackwell's Island, in pursuance of which the marshal delivered him into the custody of the keeper of the Blackwell's Island Penitentiary:

Held, That the sentence did not direct him to be imprisoned in any particular State prison or penitentiary, and that he was properly delivered to the custody of the keeper of the Blackwell's Island Penitentiary, whether he was imprisoned by virtue of the direct sentence of the Court, or by virtue of the Rule of the Circuit Court on the subject, (4 *Blatchf. C. C. R.*, 541.)

That such prisoner was, under the Act of Congress of June 30th, 1834, (4 *Stat. at Large*, 739,) exclusively under the control of the officers having charge of such penitentiary.

A pardon for a prisoner so imprisoned was made out and signed by the outgoing President of the United States; on the 3d of March, 1869, and was

transmitted on that day by the Department of State to the marshal of the Southern District of New York, and received by the marshal on the 5th of March, and, on the 6th of March, the incoming President directed the Secretary of State to order the marshal, if the prisoner had not been released, to consider the pardon as cancelled, and to return the same, which the marshal did, and, on the 8th of March, the President signed an order, reciting that the pardon had not been delivered, and ordering that the pardon be revoked and withdrawn; and thereafter, on *habeas corpus*, directed to the warden of the penitentiary, the prisoner was brought before this Court:

Held, That the writ of *habeas corpus* was properly directed to the warden;

That, as the pardon had never been delivered to the warden, it had not been delivered to the prisoner, and the incoming President had the power to cancel it, as the President who signed the pardon would have had.

BLATCHFORD, J. The petitioner, Moses De Puy, represents that he is restrained of his liberty by John Fitch, warden of the Penitentiary at Blackwell's Island, within the Southern District of New York; that the said John Fitch, warden, as aforesaid, claims to restrain the petitioner of his liberty, and to detain him at the penitentiary aforesaid, on the following grounds, namely, that, at the January term, 1869, of the Circuit Court of the United States for the Southern District of New York, one Jacob De Puy and the petitioner were convicted of having rescued spirits from the custody of a revenue officer of the United States, in violation of the provisions of the internal revenue laws, and were sentenced as follows, namely, the said Jacob De Puy to imprisonment for two years, and to pay a fine of six hundred dollars, and the petitioner to one year's imprisonment, and to pay a fine of two dollars; that, in pursuance of said conviction and sentence, the petitioner was, on the 18th of February, 1869, taken to the Penitentiary at Blackwell's Island, aforesaid, and has ever since that day been, and now still is, there confined, under the charge of John Fitch, the warden, as aforesaid; and that, on the 3d of March, 1869, the President of the United States, in pursuance of the authority vested in him by the Constitution of the United States, granted to the said Jacob De Puy and the petitioner a

pardon for the offences of which they respectively stood convicted, conditioned upon the payment by them of their respective fines so imposed on them by the sentence aforesaid. A copy of the pardon is annexed to the petition. It is stated, in the petition, that the pardon was duly signed by the President, was sealed with the great seal of the United States, and was countersigned by the Secretary of State, and was duly forwarded by mail to the marshal of the Southern District of New York, for and on behalf of the petitioner; and the petition refers, in that connection, to an affidavit which is annexed to it. That affidavit is made by one James M. Nelson, and states, that, on behalf of Jacob and Moses De Puy, he presented a petition for their pardon to the President of the United States; that, after considering the same, the President endorsed on the petition a direction that a pardon issue, and requested him, Nelson, to take the petition and endorsement to the Attorney General; and that he took the petition to the Attorney General's office, and left it with the Attorney General, and received from the Attorney General a letter to the Secretary of State. That letter, also, is annexed to the petition. It is dated the 3d of March, 1869, and is signed by the Attorney General, and is addressed to the Secretary of State, and states, that the Attorney General is directed by the President to request the Secretary of State to issue a warrant for the pardon of Jacob De Puy and Moses De Puy, with certain recitals. Nelson further states, that he took that letter to the office of the Secretary of State, and obtained from that office a pardon, ready for signature, and took the pardon to the President, and obtained his signature thereto, and then took it to the office of the Secretary of State; that the Secretary of State signed it, and directed his chief clerk to have the seal of the United States attached, and to have the pardon, and a letter in relation to it, sent to the marshal; that he, Nelson, asked the chief clerk of

the Department of State, whether he, Nelson, would not be permitted to take the pardon; that the chief clerk said, no, that it must be sent to the marshal, that that was the usual course of business in such cases, and that it would be forwarded immediately on its being finished; and that the pardon was subsequently forwarded by the State Department to the marshal. The petition further states, that the marshal received the pardon, by due course of mail, on the 6th of March, but did not deliver it to the petitioner, and, on the contrary, detained it; that it has been the invariable custom of the Executive of the United States, on granting a pardon, to cause it to be forwarded by mail to the marshal of the district in which the prisoner is confined; that such deposit in the mail is the only delivery recognized by the Executive for the delivery of the pardon to the prisoner; that the marshal receives the same as agent for, and on behalf of, the prisoner, and in no other capacity; and that the marshal, in this case, received this pardon in compliance with said custom, and as the agent of the petitioner. The petition then alleges, that the petitioner, by virtue of the pardon so issued, was entitled to be set at liberty forthwith, and to be no longer restrained of his liberty, upon his paying the fine imposed on him by said sentence of conviction, and which fine, he states, has been duly paid by him to the clerk of the Court before which he was convicted. He, therefore, prays for a writ of *habeas corpus*, directed to the warden of the penitentiary, commanding him to produce before this Court the body of the petitioner.

The writ was issued, and the petitioner was brought before the Court. At the same time the return was made by the warden to the writ. In the return the warden states, that he produces the body of the petitioner, and that the cause of his imprisonment appears by copies of two commitments annexed to the return. The first one of those commitments is an order made by

the Circuit Court of the United States for this District, on the 15th of February, 1869, entitled in the case of *The United States* v. *Moses De Puy*, and reading as follows: "On motion of the United States District Attorney, ordered sentence. Thereupon, the Court proceed to pass judgment, and sentence the prisoner, Moses De Puy, on the first count, to be imprisoned at Blackwell's Island for the term of six months, and to pay a fine of one dollar, and stand committed until paid; and, on the second count, to be imprisoned at Blackwell's Island for the term of six months and pay a fine of one dollar, and stand committed until paid—this sentence to commence on the termination of the first." The other commitment is a paper signed by the marshal of the United States for the Southern District of New York, and dated February 18th, 1869, and entitled in the case of *The United States* v. *Jacob De Puy and Moses De Puy*, "charged with removing distilled spirits to other than a bonded warehouse." It reads as follows: "Jacob De Puy and Moses De Puy, defendants in the above-entitled cause, are delivered by me into the custody of the keeper of the Blackwell's Island Penitentiary, in pursuance of the statutes in such cases made and provided." The return further states, that there is annexed thereto a true copy of the record of the proceedings and judgment in the Circuit Court of the United States for this District, upon which the said Moses De Puy was sentenced and is now imprisoned, being the same judgment that is contained in the order before referred to, of the 15th ef February, 1869. By that record it appears, that Jacob De Puy and Moses De Puy were indicted in the said Circuit Court. The indictment contained four counts, upon the first and second of which the petitioner, Moses De Puy, appears to have been convicted and sentenced. Those two counts are identical, except that the first one alleges an offence committed on the 15th of May, 1868, and the second one an offence committed on the 16th of May,

1868, the offence set forth in each being the same, and being set forth in each in the same language—rescuing, and attempting to rescue, and aiding and assisting in rescuing, distilled spirits, in one case fifty barrels, and in the other case thirty-two barrels, from the custody of a revenue officer. The record shows, that both of the prisoners, Jacob De Puy and Moses De Puy, were arraigned on this indictment on the 26th of December, 1868, and pleaded to it not guilty, the indictment having been found on the 15th of December, 1868. On the 7th of January, 1869, as appears by the record, a trial was ordered on the indictment. On the 13th of January the jury found both of the prisoners guilty. On the 10th of February a motion for a new trial, which had been previously made, was denied, and judgment was ordered on the verdict, and, as before stated, the judgment and sentence were passed on Moses De Puy on the 15th of February. The return further states, that the judgment and sentence have never been reversed, vacated or set aside, but still stand in full force and effect. The return also states, that no pardon for the said offence whereof Moses De Puy stands convicted and sentenced, according to the said record, has ever been issued or delivered to or for Moses De Puy, or to any one on his behalf.

The pardon, of which a copy is annexed to the petition, bears date on the 3d of March, 1869. It is in the form of Letters Patent, and commences with these words: "Andrew Johnson, President of the United States of America, to all to whom these presents shall come, greeting." It then recites, that, at the January term, 1869, of the United States Circuit Court for the Southern District of New York, Jacob De Puy and Moses De Puy were convicted of having rescued spirits from the custody of a revenue officer of the United States, in violation of the provisions of the internal revenue laws, and sentenced as follows: Jacob De Puy to imprisonment for two years, and to pay a fine of six

hundred dollars, and Moses De Puy to one year's imprisonment, and to pay a fine of two dollars. It then recites the considerations which moved the President to grant the pardon, and states that, in consideration of the premises, divers other good and sufficient reasons moving him thereunto, he grants to the said Jacob De Puy and Moses De Puy a pardon for the offences of which they stand convicted, conditioned upon the payment of their said fines. The pardon is signed by the President and the Secretary of State, and bears the seal of the United States.

The return to the writ is traversed by the petitioner. The traverse states, that he denies that the judgment and sentence stand in full force and effect; that he denies the allegation, in the return, that no pardon of the offence whereof he was convicted and sentenced, according to the record annexed to the return, was issued or delivered to or for him, or to any one on his behalf; and that he avers and insists that a pardon for the offence of which he was convicted has been issued and delivered to him in the manner and form more fully and at large set forth in the petition.

Upon the issue of fact thus joined evidence was put in, consisting, mainly, of statements admitted by both parties to be correct. Among such evidence is a certified copy, from the records of the Department of State, of what appears to be a record of the pardon, in the same words with the copy of the pardon that is annexed to the petition. It was also admitted by the District Attorney, representing the United States, that the only conviction against Moses De Puy, and the only sentence passed upon him, were the conviction and sentence contained in the record attached to the return. It was also admitted by both parties, that the original of the pardon was sent through the mail by the Department of State, to the marshal of the United States for this District, enclosed in a letter, of which the following is a copy:

"Department of State, Washington, 3d of March, 1869. Robert Murray, Esq., marshal of the U. S. for the Southern District of New York. Sir: I transmit herewith the President's warrant for the conditional pardon of Jacob and Moses De Puy, the receipt of which you will please acknowledge. I am, sir, your obt. servant, F. W. Seward." It was also admitted, that the original pardon enclosed in that letter was received at the office of the marshal, in this city, on the 5th of March, 1869, with the letter; that numbers of pardons for persons convicted in the Courts of the United States in this District had been previously received by the marshal at his office, from the Department of State, with similar letters; that he usually gave or transmitted such pardons to the keepers of the prisons where the persons pardoned were confined; and that such pardons were usually received by the marshal by mail. It was also admitted, that, on the 6th of March, 1869, the President, by a verbal order, directed the Secretary of State to send to the marshal of the Southern District of New York a communication in relation to this pardon; that the Secretary of State obeyed this verbal order, and transmitted to the marshal a telegraphic despatch, in the following words: "Washington, March 6th, 1869. To Robert Murray, U. S. marshal: If Jacob and Moses De Puy have not been released, you will regard their pardon as cancelled, and will return the same to this department. E. B. Washburne, Secretary of State;" that this telegraphic despatch was received at the office of the marshal, in this city, on the same day, the 6th of March; that, on the same day, the original pardon, which still remained in the hands of the marshal, was put by him on the way of its return to the State Department; and that it reached the State Department thereafter. It was also admitted, on the hearing, that the President thereafter verbally directed the Secretary of State to cancel the pardon, and never gave any other or further

direction in regard to it. It was also understood, on the hearing, that communication was to be had with the Department of State, for the purpose of learning what there was, if anything, on record there on the subject, that had transpired after the return of the pardon. In pursuance of such understanding, I have been furnished with a despatch from the Second Assistant Secretary of State to the District Attorney, in which he says, that there is on file in the Department of State, an order signed by the President, dated the 8th of March, 1869, stating that, whereas the pardons in question have not been delivered to, and accepted by, the said Jacob and Moses De Puy, or either of them, it is ordered that the said pardons be, and the same are, revoked and withdrawn; and that nothing further has taken place in regard to the matter. The fact was also put in evidence, that Moses De Puy, on the 12th of May, 1869, paid to the Clerk of the Circuit Court the fine of two dollars imposed upon him by the sentence, and which he was required to pay as a condition of the pardon.

Various questions were discussed on the hearing, especially the question as to the correspondence of the terms of the pardon with the actual offences of which the petitioner was convicted and for which he was sentenced. I do not consider it important to consider that point. I assume that the pardon recites the offences properly.

The main ground upon which the discharge of the petitioner is claimed is, that the pardon was delivered to the marshal, and, being delivered to the marshal, was delivered to the petitioner; that the proceedings which took place were of such a character that the pardon was irrevocable; that the President had no authority or power to control the disposition to be made of the original paper in the hands of the marshal; and that the petitioner was entitled to the benefit of it, as a complete and full pardon.

I have given careful consideration to the questions raised in regard to this branch of the case, and have examined the authorities cited, and the statutes bearing on the subject, and have come to a conclusion satisfactory to my own mind. The question is an important one—a question of constitutional law, as to the proper construction of the powers of the President, under the Constitution, in regard to pardons, and a question involving personal liberty; and for these reasons, and because I think it desirable that the true character of a pardon should be defined, I shall proceed to state, at considerable length, my views on the question, and the only question, which, it appears to me, is to be determined in this case, namely, whether this pardon was, or was not, actually delivered to the petitioner, in judgment of law.

It is contended, on the part of the petitioner, that, when this pardon received the signature of the President, and the seal of the Department of State, it was a completed act, and passed beyond the control of the President. I think that is an entire mistake. The law undoubtedly is, that when a pardon is complete, there is no power to revoke it, any more than there is power to revoke any other completed act. And yet the question still remains—when is a pardon complete? It is argued, that a pardon stands on the same footing as a commission; and the doctrine of the case of *Marbury* v. *Madison*, (1 *Cranch*, 137,) is invoked in support of this view. The opinion of the Court, in the case of *Marbury* v. *Madison*, was delivered in 1803, by Chief Justice Marshall, the same Judge who, afterwards, in 1833, delivered the opinion of the same Court, in the case of *United States* v. *Wilson*, (7 *Peters*, 150.) In the case of *Marbury* v. *Madison*, the President of the United States had nominated Marbury to the Senate, for its advice and consent, to be appointed to the office of a justice of the peace of the District of Columbia. The Senate advised and

consented to the appointment. The President signed the commission appointing Marbury to be such officer, and the seal of the United States was, in due form, affixed to it by the Secretary of State. Application was made to the Secretary of State to deliver the commission to Marbury. It was not delivered, but was withheld. On that state of facts, the question came before the Supreme Court, as to whether Marbury was entitled to have his commission delivered to him, on the view that the delivery was a purely ministerial act, or whether there was any power on the part of the President, or of the Secretary of State, to control the commission. The Chief Justice, in his opinion in the case, uses this language: "In order to determine whether he is entitled to this commission, it becomes necessary to inquire whether he has been appointed to the office. For, if he has been appointed, the law continues him in office for five years, and he is entitled to the possession of those evidences of office, which, being completed, became his property." He then shows, that the Constitution and laws contemplate, in regard to offices, three distinct operations: 1st. The nomination, which "is the sole act of the President, and is completely voluntary;" 2d. The appointment, which "is also the act of the President, and is also a voluntary act, though it can only be performed by and with the advice and consent of the Senate;" 3d. The commission. He then states, that, in the case before the Court at that time, the appointment was made by the President, by and with the advice and consent of the Senate, and was evidenced by no act but the commission itself; that the appointment, being the sole act of the President, was completely evidenced, when it was shown that the President had done everything to be performed by him; and that, even if the commission, instead of being evidence of an appointment, should be considered as constituting the appointment itself, still, the appointment would be made when

the last act to be done by the President was performed, or, at farthest, when the commission was complete; that the last act to be done by the President was the signature of the commission; that he had then acted on the advice and consent of the Senate to his own nomination; that the time for deliberation had then passed, and the President had decided; that his judgment on the advice and consent of the Senate, concurring with his nomination, had been made, and the officer was appointed; that the appointment was evidenced by an open and unequivocal act; that this act, being the last act required from the person making it, necessarily excluded the idea of its being, so far as respected the appointment, an inchoate and incomplete transaction; that the power of appointment was exercised when the last act required from the person possessing the power had been performed; and that the last act was the signature of the commission. He then goes on to say, that, when the seal was affixed, if the affixing of the seal was to be considered as necessary to the validity of the commission, the appointment was made, no farther act remaining to be performed on the part of the Government. He then proceeds to consider the argument that was urged in reference to a commission—that it was like a deed, to the validity of which delivery was essential—and says: "It has been conjectured that the commission may have been assimilated to a deed, to the validity of which delivery is essential." On this subject, he comes to the conclusion, that, if the act of delivery was necessary to give validity to the commission, it was delivered when it was executed and given to the Secretary of State for the purpose of being sealed, recorded, and transmitted to the party. But he holds that, in the case of a commission, a formal delivery to the person is not among the solemnities required as evidences of the validity of the instrument, and that only the sign manual of the President, and the seal of the United States,

are those solemnities. He thus expressly puts a commission, as evidence of an appointment having been made to an office by the President and Senate, on a totally different ground from an instrument which requires delivery, and holds that, when the appointment is made by the President, by and with the advice and consent of the Senate, and the President has signed the commission, and the seal of the United States has been affixed to it, the President has done everything that he has any right to do in the premises; that his power then ceases; and that a delivery of the commission is not essential to the validity of the appointment. He then says: "If the transmission of a commission be not considered as necessary to give validity to an appointment, still less is its acceptance." He illustrates this view by the fact, that when a person appointed to any office refuses to accept it, the successor is nominated in the place of the person who has declined to accept, and not in the place of the person who had been previously in office, and had created the original vacancy.

I have gone thus, at some length, into the views of the Chief Justice, in the case of *Marbury* v. *Madison*, for the purpose of showing, in contrast with these views on the subject of an appointment and a commission, that the same Judge, in the same Court, in delivering the judgment of the Court, in the case of *United States* v. *Wilson*, placed a pardon by the President on a totally different footing from that on which a commission was placed, in the case of *Marbury* v. *Madison*. In *United States* v. *Wilson*, the Chief Justice says: "A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed. It is the private, though official, act of the Executive magistrate, delivered to the individual for whose benefit it is intended. * * * A pardon is a deed, to the validity of

which delivery is essential, and delivery is not complete without acceptance." In the case of *Marbury* v. *Madison*, it was held, that a commission was not a deed, or assimilated to a deed, and that delivery was not essential to its validity. The two instruments are thus placed in as direct antagonism, on the question of the necessity of a delivery, as it is possible for the same Court, speaking through the same distinguished jurist, to place two matters. It is manifest, therefore, that, under the Constitution and laws of the United States, a pardon must be regarded as a deed, to the validity of which delivery is essential. It is, also, apparent, that the decision in the case of *Marbury* v. *Madison* furnishes no support to the views urged on the part of the petitioner.

The only question in this case is, whether this pardon was delivered, in the sense of the law, to the petitioner, or to any person for him. All that was done in regard to the pardon was, that the Secretary of State transmitted it to the marshal, with a letter, stating: "I transmit herewith the President's warrant for the conditional pardon of Jacob and Moses De Puy, the receipt of which you will please acknowledge." In the case of *Commonwealth* v. *Halloway*, (44 *Pennsylvania R.*, 210,) a *habeas corpus* was issued to bring up the body of a prisoner who claimed to have been pardoned. The case was one before the full bench of the Supreme Court of Pennsylvania, the opinion of the Court being delivered by Chief Justice Lowrie. In the opinion, the Chief Justice says: "There are charters or patents for new inventions, for lands, for grants of corporate privileges, and as commissioners of public affairs, as well as those of pardons; and, though all these have a strong likeness as to their form, and to the source whence they immediately proceed, yet they have also some marked points of unlikeness that warn us to be cautious about confounding the rules that belong to any one kind with those of another. We notice here only the distinction

that is important for this case. With us, those that relate to new inventions, to lands, to corporate privileges, and to offices, are usually only the last step in the process by which certain rights become completely vested; and, when all preliminary steps are regular and complete, this last step becomes a mere ministerial duty, definitely prescribed by law, and the claimant has a right to demand that it shall be taken, because he has performed all the conditions upon which the law has made his title to it to depend." That was the case in *Marbury* v. *Madison*, where the last step—the delivery of the commission—was a mere ministerial duty, the right to the office having previously become a vested right. He then goes on to say: "But charters of pardon are entirely different from these, in the conditions on which they depend; for, (not to speak of those which are issued in pursuance of promises, by proclamation or otherwise, of executive clemency,) they are forwarded on mere grace, and not at all on preliminary steps that furnish legal merits or a legal title to them. The *intention* of the Executive to grant a pardon can have no legal force until carried into completed act. And his instructions to his proper officers, and their work in pursuance of his instructions, are only the means by which he embodies his intentions into the completed act, and have no force out of the Executive sphere until thus completed, though the Courts may, when the intention is satisfactorily shown, suspend further proceedings, in expectation of the actual pardon, as has been sometimes done in England. The completed act is the charter of pardon and *delivered*. This is the one and only step that gives title to a pardon. Until delivery, all that may have been done is mere matter of intended favor, and may be cancelled, to accord with a change of intention." He then discusses the question—"Was this pardon delivered?" It appeared that it had come to the hands of the warden of the prison; and the Court

says, that, "by usage, its delivery to the warden is *prima facie* equivalent to delivery, or is a constructive delivery, to the prisoner; but it is open to be proved no delivery, by showing circumstances that are inconsistent with the intention to deliver it."

In the present case, the petitioner was in the Penitentiary on Blackwell's Island, under a sentence which directed him to be imprisoned at Blackwell's Island, in pursuance of which the marshal, by a written paper, delivered him into the custody of the keeper of such Penitentiary. By the 3d section of the Act of March 3d, 1863, (13 *U. S. Stat. at Large*, 500,) it is provided, "that, in every case where any person convicted of any offence against the United States shall be sentenced to imprisonment for a period longer than one year, it shall be lawful for the Court by which the sentence is passed, to order the same to be executed in any State prison or penitentiary within the district or State where such Court is held, the use of which prison or penitentiary is allowed by the Legislature of such State for such purposes; and the expenses attendant upon the execution of such sentence shall be paid by the United States." Under that provision of law, a Court of the United States has no right to order a person who is sentenced to imprisonment for a period of one year, or less, to be confined in any particular State prison or penitentiary. The sentence in the case of the petitioner being, taking together the two terms of six months each, not longer than one year, the Court had no right to order the petitioner to be imprisoned in any particular State prison or penitentiary. Nor does the sentence, in terms, order him to be imprisoned in any particular State prison or penitentiary. It merely orders him to be imprisoned at Blackwell's Island. In pursuance of that order, the marshal delivered him into the custody of the keeper of the Blackwell's Island Penitentiary. By a rule made by the Circuit Court for this District, on the 4th of March,

1840, (4 *Blatchf. C. C. R.*, 541,) it is provided, that, in all cases in which persons convicted of offences against the statutes of the United States, shall be sentenced to imprisonment, and the sentence shall not also specify that the party shall be kept at hard labor, it shall be the duty of the marshal to cause such party to be imprisoned in any one of the prisons within the city and county of New York, which he may select for the purpose. Now, in this case, whether the sentence which orders the petitioner to be imprisoned at Blackwell's Island, be considered as a sentence that he be imprisoned in the Penitentiary at Blackwell's Island, or whether the portion of the sentence which refers to Blackwell's Island be considered as surplusage, or as void, so that the case would fall under the rule of Court, of March, 1840, the sentence not specifying that the petitioner shall be kept at hard labor, and the marshal having had a right to cause the petitioner to be imprisoned in any one of the prisons within the city and county of New York, which he should choose to select for the purpose, and the Penitentiary at Blackwell's Island being within the city and county of New York—in either view, the petitioner was properly imprisoned in the Penitentiary at Blackwell's Island. Whether he was to be imprisoned there by virtue of the direct sentence of the Court, or whether he was to be imprisoned there under the rule of Court, of March, 1840, the marshal acted properly in delivering him into the custody of the keeper of the Blackwell's Island Penitentiary.

There is also an Act of Congress, passed on the 30th of June, 1834, (4 *U. S. Stat. at Large*, 739,) which provides, "that, whenever any criminal, convicted of any offence against the United States, shall be imprisoned, in pursuance of such conviction, and of the sentence thereupon, in the prison or penitentiary of any State or territory, such criminal shall, in all respects, be subject

to the same discipline and treatment as convicts sentenced by the Courts of the State or territory in which such prison or penitentiary is situated; and, while so confined therein, shall also be exclusively under the control of the officers having charge of the same, under the laws of the said State or territory." The petitioner being lawfully in the penitentiary at Blackwell's Island, in any view, in pursuance of his conviction and sentence, he was, by virtue of the Act of 1834, exclusively under the control of the officers having charge of such penitentiary, under the laws of the State. So long as this delivery into the custody of the warden of the penitentiary remained in force, the marshal had no control over the petitioner, and no power to remove him from the penitentiary. The writ of *habeas corpus*, in this case, was, therefore, properly directed to the warden of the penitentiary, because the petitioner was, by virtue of the Act of 1834, exclusively under the control of such warden. Under that state of facts, the question arises, whether, when a prisoner is exclusively under the control of the warden of a prison—even though it may not be necessary to deliver a pardon to the prisoner himself, and even though the delivery of a pardon to the warden of the prison, who has the exclusive custody and control of the prisoner, may be equivalent to a delivery to the prisoner—whether a delivery of a pardon to any other person, before it reaches the warden of the prison, is equivalent to a delivery to the warden of the prison. This question must be answered in the negative, not only on general principles, but on the evidence in this case. It appears, that the marshal usually gave or transmitted the pardons which he received from the Department of the State, to the keepers of the prisons where the prisoners pardoned were confined. Why were the pardons sent to the keepers of the prisons? Undoubtedly, because, under the Act of 1834, the prisoners were and are in the custody of the keepers of the prisons, and

not in the custody of the marshal. The marshal, having no power to take a prisoner out of the prison, cannot go to the prison with a pardon and take the prisoner out, retaining the pardon himself; and the fact, that the marshal has always been in the habit of giving or sending pardons to the keepers of prisons, serves to show conclusively that the delivery of a pardon, in order to be effective, must be, at least, a delivery to the keeper of the prison.

The marshal was, in this case, no more than the messenger of the President. If the President had sent the pardon by a special messenger, and had directed him to go to the warden of the Blackwell's Island Penitentiary, and to deliver the pardon to him, and had despatched the messenger on his way, it cannot be questioned that the President could, by a telegraphic dispatch, or any other communication, to the messenger, while on his way, have lawfully directed the messenger not to deliver the pardon to the warden. If the President can arrest the mission of the messenger when the messenger has departed but ten feet from the door of the presidential mansion, he can arrest such mission at any time before the messenger delivers the pardon to the warden of the prison.

No question arises, in this case, concerning any right or power, on the part of the President, to revoke or recall a completed pardon. In the language of Chief Justice Lowrie, before cited, "the completed act is the charter of pardon and delivered. This is the one and only step that gives title to a pardon. Until delivery, all that may have been done is mere matter of intended favor, and may be cancelled, to accord with a change of intention."

The point urged, on behalf of the petitioner, that the pardon was signed by President Johnson, and was sealed during his administration of the Executive office, and that the order to the marshal to return the pardon

to the Department of State was made by his successor, President Grant, is of no force. The office of President did not die when President Johnson gave place to President Grant. The power of pardon is conferred by the Constitution upon the office of President. The President who signed the pardon in this case would have had precisely the same right which I think his successor had, to arrest the pardon before it was delivered to the warden of the prison; and the successor had the same right in that respect as his predecessor would have had. I place my decision, in this case, solely on the ground that there never was any delivery of the pardon to the petitioner, or to any one for him. There never was any completed pardon. It has not been contended, on the part of the United States, that the President has power to annul, or withdraw, or cancel a completed pardon.

In connection with the fact that the pardon was never delivered to the petitioner, or to any one for him, there is one circumstance that is worthy of observation, and that is, that Nelson, the person who went to Washington to procure this pardon, asked to have it delivered to him, and was refused, it being stated to him by the chief clerk of the Department of State, that the pardon must be sent to the marshal. That was equivalent to a declaration by the Executive authority of the United States, that the benefit of a *locus penitentiæ* was claimed. If the pardon had been delivered to Nelson, for the petitioner, the case might, perhaps, have been different. I do not say that it would; but the circumstance that a request to deliver the pardon to a person claiming to be the agent of the petitioner was refused, is worthy of consideration. The Executive authority plainly said to Nelson, that it would not transmit this pardon by him, as the messenger of the petitioner, but would transmit it by its own messenger.

Upon the ground that there was no delivery of the pardon in this case to the petitioner, or to any one for

him, or to the warden of the prison, who, by Act of Congress, had the exclusive control and custody of the petitioner, I hold that the petitioner is not entitled to be discharged, and that he must be remanded to the custody of the warden of the penitentiary at Blackwell's Island.

Edwards Pierrepont, District Attorney, for the United States.

Edwin W. Stoughton and *Clarence A. Seward*, for the petitioner.

JUNE, 1869.

THE BARK THALES.

LIEN FOR SUPPLIES.—BONDING VESSEL.—RE-ARREST.

Where a libel was filed against a vessel, to recover for supplies furnished to her and the vessel, having been seized under process issued on the libel, was, on the 10th of July, 1857, discharged on a bond given without notice to the libellants, the practice of the Court at that time not requiring such notice, and, on the 4th of March, 1858, the libellants, on consent of the claimants, discontinued the cause, paying the costs of the action, and, on the same day, filed another libel against the vessel for the same cause of action:

Held, That the vessel was discharged of the lien for the supplies by the giving of the bond in the first suit, and was not liable to the second action.

BLATCHFORD, J. This libel was filed March 4th, 1858, by the firm of B. M. & E. A. Whitlock & Co., against the bark Thales, to recover a sum of money, as the balance remaining due for certain repairs, supplies, and advances claimed to have been furnished at Pensacola, Florida, in the fall of 1856, by the firm of Keyser, Judah & Co., commission merchants there, for the use

of the bark, and on her credit. When the suit was brought, the claim belonged to B. M. & E. A. Whitlock & Co., and it has since been assigned to William H. Judah, who has been substituted as libellant.

One of the defences set up in the answer is, that, on the 9th of July, 1857, a libel was filed in this Court by B. M. & E. A. Whitlock & Co., against the same vessel, for the same cause of action; that the vessel was arrested in that suit, and was duly discharged, on a bond being given in due form; and that thereby the vessel was discharged from the claim, so that this suit cannot be maintained against her. It appears, that the libel in the former suit was for the same cause of action, and that, on the filing of a claim, and of a stipulation for the claimants' costs, together with a bond, under the Act of Congress, in double the amount claimed, approved by the judge of the Court, the vessel was discharged from custody by the marshal. There can be no doubt that the vessel is not liable to arrest in this action for the same cause of action for which she was arrested in the former action, she having been duly discharged on bond in that action. In *The Union*, (4 *Blatchf. C. C. R.*, 90, 93,) Mr. Justice Nelson says: "The vessel, after being discharged from the arrest, upon the giving of the bond or stipulation, returns into the hands of her owner, subject to all previously existing liens or charges, the same as before the seizure, except as respects that on account of which the seizure was made." If the Court has no power to order a vessel which has been fairly discharged, on a bond or stipulation, from an arrest, back into the custody of the marshal, in the same suit, as was held in the case of *The Union*, and also in the case of *The White Squall*, (*Id.*, 103,) *a fortiori*, it has no power to order her to be arrested a second time, in another suit, for the same cause of action. To order her back into the custody of the marshal, in the same suit, when she has been fairly, and not improvidently, or by fraud, or mistake,

discharged by bonding, is simply to arrest her a second time for the same cause of action, after she has been discharged, by bonding, from the lien or charge in respect of which she was arrested. To arrest her, under the same circumstances, in a new suit, for the same cause of action, is to do nothing more or less. In *The Kalamazoo*, (9 *Eng. Law & Eq. R.*, 557, 560,) Dr. Lushington says: "It is perfectly competent to take bail to the full value; but the effect of taking bail is to release the ship in that action altogether. It would be perfectly absurd to contend that you could arrest a ship, take bail to any amount, and afterwards arrest her again for the same cause of action. The bail represents the ship, and, when a ship is once released upon bail, she is altogether released from that action."

The libellant urges, that the fact that the former suit was discontinued, and that the costs therein were paid, before the present suit was brought, remits the libellant to all the rights which he had at the time he instituted the former suit, and that such discontinuance operates to make the arrest of the vessel, in the present suit, an original arrest, and not a second arrest. This view overlooks the fact that the vessel was discharged on bond, on the 10th of July, 1857, and that the former suit was not discontinued until the 4th of March, 1858. The rights of the parties interested in the vessel were fixed by the bonding and discharge, and she then returned into their hands freed from the lien or charge for which she had been arrested, and from liability to be again arrested therefor.* Such liability could not be renewed or recreated, against their consent, by the action of the libellants in discontinuing the suit. The fact that the suit was discontinued with the consent of the claimants therein, and that they received and accepted the costs of the suit, indicates no intention, actual or in law, to

* See *Coote's Adm. Practice, p.* 23.

thereby subject the vessel to a second arrest, or to waive the rights in that respect which then belonged to them.

The fact that the vessel was bonded and discharged in the former suit without notice to the libellants makes no difference. It was not irregular, according to the established practice of the court at that time, to discharge the vessel on bond, without such notice being given. Besides, relief in that respect cannot be given in a collateral action. Any irregularity, if it existed, should have been corrected by a direct application to the Court, in the former suit.

The libel must be dismissed, with costs.

Horace Andrews, for the libellant.

Robert D. Benedict, for the claimants.

JUNE, 1869.

JONAS SMITH *et al. v.* RUSSELL STURGIS *et al.*

COLLISION.—STALE CLAIM.

Where a libel was filed on March 31st, 1866, against the owners of a steam-tug, to recover damages for the sinking of a schooner by her, on December 28th, 1859, the tug having been for more than a year after the collision within the district, and her owners having been residents of the district, or carrying on business therein, and no excuse having been shown for the delay of six years and a quarter in commencing the suit:

Held, That the claim was barred by its staleness.

BLATCHFORD, J. This is a libel, sworn to on the 29th of June, 1865, and filed on the 31st of March, 1866, against six respondents, as owners of the steam-tug

Yankee, to recover the sum of $19,000, as the damages sustained by the libellants, owners of the schooner Colonel Satterly, by a collision, which occurred between the two vessels on the 28th of December, 1859, in the lower bay of New York. Only three of the respondents were served with process, and one of them, Sturgis, has answered for himself and the others. One of the defences set up in the answer is, that the cause of action did not accrue within six years before its commencement, and that, by reason of the neglect of the libellants to prosecute the action, the demand has become stale, and ought not in equity to be enforced against the respondents, many of them having lived and been almost daily within the jurisdiction of this Court since the time of the collision. One or more of the respondents had ceased to live when the libel was filed. The Yankee, for more than a year after the collision, was daily in the port of New York, employed in the service of the respondents. In 1861, she went into the employ of the United States, under a charter, and she was afterwards sold to the United States. All of the respondents, while they owned her and lived, either resided in the city of New York, and carried on business there, or frequented it in the way of business. The delay on the part of the libellants in bringing suit seems to have been without any plausible excuse. The written and verbal communications set up by the libellants as having passed between their legal adviser and Sturgis, on the subject, proved abortive, and were suspended, long before the libel was filed. The case is one of deliberate and inexcusable laches and staleness. It is shown that two or three of those who were on board the Yankee at the time had disappeared, beyond recall, before the libel was filed. The testimony of those witnesses who have been produced on the part of the Yankee is so in conflict with the testimony of the witnesses for the libellants, as to make it incumbent on the Court to give no advantage to the libellants which

they may have secured to themselves by the delay in bringing their suit. The six years and a quarter which elapsed before the libel was filed, not being excused, I must hold the claim to be barred by its staleness. (*The Sarah Ann*, 2 *Sumner*, 206, 212; *Joy* v. *Allen*, 2 *Woodb. & M.*, 303, 324; *Jay* v. *Allen*, 1 *Sprague*, 130.) The libel is dismissed, with costs.

Beebe, Donohue & Cooke, for the libellants.

William Allen Butler, for the claimants.

JUNE, 1869.

IN THE MATTER OF GEORGE W. NOBLE, A BANKRUPT.

First Meeting of Creditors.—Contested Votes.—Power of Register.

Where, at the first meeting of the creditors of a bankrupt, one creditor objected to the reception of the votes of other creditors, offering to prove that their votes had been influenced by the bankrupt, and were collusive and fraudulent:

Held, That the register had no power, without the special order of the Court, to inquire into the right of creditors to vote, save for the purpose of postponing the proof of claims until an assignee should be chosen.

At the first meeting of creditors in these proceedings, while the vote for the election of an assignee was proceeding, the counsel for a portion of the creditors objected to the receiving of the votes of several of the creditors, offering to prove that their votes had been influenced and procured by the bankrupt, acting in his own interest, and that such votes were, therefore, collusive and fraudulent. The register declined to hear such

proof, holding that he had no power, without the special order of the Court, to inquire into the right of creditors to vote, save for the purpose of postponing the proof of claims until an assignee should be chosen pursuant to the provisions of the 23d section of the Act. The register certified the question to the Court, with his opinion, as follows: "Pursuant to the 19th Rule of this Court, I beg to submit, that the Act does not expressly require the register to take such proceeding. As a matter of practice, it would involve the parties, in some cases, in very great labor, and put them to much expense, in taking testimony of the character here offered. Besides, it would often greatly postpone the choice of an assignee, and that perhaps to the detriment of the assets of the bankrupt. Unless in case of strong probability, made out and sustained by affidavits, it would seem that such labor and expense ought not to be imposed. Such a charge is easily made, and is with difficulty rebutted. It is already a standing rule, that, in case the register shall be satisfied that any reason exists why an assignee, elected or appointed, should not be approved by the Judge, he shall state such reason fully, in submitting the question for approval. I think this a sufficient safeguard against evils of this character."

BLATCHFORD, J. The decision of the register was correct, and his views, above expressed, are approved.

JUNE, 1869.

THE STEAMER CUMBRIA.

Collision in Hampton Roads between Steamers.—Parallel Courses.—Lookout.

Where two steamers, the F. bound into Hampton Roads, and the C. bound out, were approaching a guardship at which each was required to report, both vessels heading on courses nearly parallel with the keel of the guardship, and the C. had the guardship on her starboard side, and made the white and red lights of the F. on her port bow, and the F. then changed her course, by starboarding, and slowed and stopped her engine for the purpose of speaking the guardship, and blew two blasts of her whistle, but the C. kept on, and struck the F. on her starboard side and sank her:

Held, That the F. was in fault in not keeping a proper lookout, and also in changing her course across the bows of the C.;

That it was her duty to pass to the right, and let the C. pass between her and the guardship.

BLATCHFORD, J. This libel is filed by the owners of the propeller Fannie, to recover the sum of $50,000 as the damages sustained by them by the sinking of that vessel by a collision between her and the steamer Cumbria, shortly after 8 o'clock P. M., on the 6th of May, 1864, near Fortress Monroe, in the Chesapeake Bay. The Fannie was in the employ of the Government, and carrying troops. She had come from Gloucester Point, in the York river, and was bound to Norfolk, Virginia. The Cumbria was also in the employ of the Government, and had come from a wharf to the westward of Fortress Monroe, and was bound to Washington city. There was a guardship stationed between Fortress Monroe and the Rip-Raps, at which every passing vessel was required to report her name and voyage. The night was such as not to obscure lights, and the tide was flood at the time, running into Hampton Roads at the rate of from three

to four knots an hour. The wind was from the eastward, blowing in the same direction in which the tide ran, and the guardship was lying with her head to the course of the tide. The collision took place when the Fannie was heading quartering across the stern of the guardship. The Fannie was struck on her starboard side by the Cumbria abaft her midship, and soon sank.

The case made by the libel is, that, as the Fannie approached the guardship, her engines were first slowed and then stopped; that, at that time, she headed about south southwest, and diagonally across the stern of the guardship; that when the Fannie had slowed her engines, the Cumbria was discovered coming out of the Roads, towards the starboard side of the Fannie; that, as the Cumbria approached nearer, the engines of the Fannie were stopped, for the purpose of speaking the guardship; and that the Fannie thereupon gave a signal by two blasts of her whistle, but the Cumbria came on, and struck her starboard side, cutting her down to the water's edge, and sinking her. The whole case made by the libel is, that the Fannie had a right to and did signal the Cumbria to starboard her helm, and that the Cumbria had time and room enough to do so, and failed to do so, and was in fault in thus causing the collision.

The case set up in the answer is, that the Fannie, before she arrived abreast of the guardship, was running with the tide, and heading about west, upon a course which would have left the guardship at a considerable distance on her port side, and would also have left the Cumbria, in passing, at a safe distance on the port side of the Fannie; that the Fannie, as she came up abreast of the guardship, took a sudden and rank sheer to the southward, and crossed the bows of the Cumbria diagonally between her and the stern of the guardship; that, when the Fannie signalled her intention to cross the bows of the Cumbria, and pass between her and the guardship, the Cumbria was too near to change her

direction, in conformity with the signal, in time to avoid the collision; and that the Cumbria, on hearing the signal, instantly reversed her engine.

I am satisfied, on the evidence, that the Fannie and the Cumbria were approaching each other on courses that were substantially parallel to each other and to the keel of the guardship, and nearly end on, but yet that the course of the Fannie, if unchanged, would have left the Cumbria between her and the guardship. The Cumbria was steering a course parallel to the keel of the guardship, but so as to leave the guardship on her starboard side, when she saw the lights of the Fannie from one and a half to two points on her port bow, the guardship bearing about one point on her starboard bow. She saw at that time only the white light and the red light of the Fannie. The signal from the Fannie soon afterwards came, and the green light of the Fannie came into view, and her red light was shut in. This indicated that she was starboarding. Her signal indicated her starboarding. She was coming with the tide, and even after she stopped her engines she had on a great deal of headway. The fact is, that the Fannie kept no proper lookout, and that she had lapped two-thirds of her own length on the guardship, and had stopped her engines, as testified to by her master, before she discovered the Cumbria. She sheered across the bows of the Cumbria, and went quartering across the stern of the guardship, from a course parallel to the keel of the guardship, without any regard to the approach of the Cumbria, or to the fact that the Cumbria was on her port bow. In any aspect, it was her duty to pass to the right, and to let the Cumbria pass unembarrassed between her and the guardship.

I do not credit the testimony of the pilot of the Fannie, that he saw the green light of the Cumbria before the Fannie sheered so as to bring her across the bows of the Cumbria to the starboard side of the latter. He was

not examined until five years after the occurrence. His testimony does not agree with that of the master of the Fannie, which was taken only seventeen days after the collision, and he is contradicted by the witnesses who were on the Cumbria. I see no fault on the part of the Cumbria.

The libel must be dismissed, with costs.*

Townsend Scudder, for the libellants.

Edward H. Owen, for the claimants.

Eastern District of New York,

JUNE, 1869.

THE BARK J. F. SPENCER.

LIEN.—CONDEMNATION AND SALE OF VESSEL.—EVIDENCE.

Where a foreign vessel was libelled, to recover for supplies furnished her in New York, and the defence was set up, that the lien had been discharged by a subsequent condemnation and sale of the vessel, as unseaworthy, at St. Thomas; and where the only witness called to prove that she was unseaworthy was the claimant, who bought the vessel, and who had taken part in the proceedings as surveyor, and was connected in business with the parties to whom the master consigned the vessel, one of the surveyors on the first survey having signed his report in blank, and refused to be on the subsequent surveys, because he "did not like the looks of things:"

Held, That the sale had not been sustained, and that the vessel was still liable for whatever supplies constituted a lien.

Courts of admiralty are not bound by the rules of evidence which are applied in the courts of common law, and they may, where justice requires it, take notice of matters not strictly proved.

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* This case was affirmed by the Circuit Court, on appeal, in February, 1871.

The Bark J. F. Spencer.

Where copies of papers pertaining to the condemnation and sale of the vessel, certified by the British consul to be copies of official documents on file in his office, had been proved by deposition a considerable time before the trial, so that the parties were not taken by surprise:

Held, That they were admissible in evidence in the admiralty.

BENEDICT, J. These are two actions against a foreign vessel, to enforce alleged liens for supplies furnished to her in this port.

The circumstances under which the advances were made are not in dispute, and they are such as, according to the maritime law, create a lien upon the vessel.

The defence, in both cases, is, that the vessel has been discharged of the lien, by reason of her subsequent condemnation and sale as unseaworthy, and the lien thereby transferred to the proceeds of that sale.

It appears, from the evidence, that, in point of fact, the vessel was condemned and sold at St. Thomas, subsequent to the furnishing of the supplies.

The proceedings and sale at St. Thomas are, however, challenged by the libellant, and it is insisted that the evidence shows a state of facts which require the Court to declare those proceedings void and of no effect, for the reason that the vessel was not in such distress as to warrant her condemnation and sale.

I propose to notice first a question of evidence, which arose upon the trial, in regard to the admissibility in evidence of certain documents, certified by the British consul at St. Thomas to be true copies of the official documents on file in his office, pertaining to the condemnation and sale of the vessel, such as the demand for a survey, the reports of the surveyors, the estimates for repairs, and the report of the sale of the vessel at auction.

Were this a proceeding at common law, those copies could not be received in evidence for any purpose. If they were copies of documents on file in the office of the American consul, they would be admissible under the

Act of January 8th, 1869. Being from the office of the British consul, they are not made evidence by any statute. Nevertheless, I am of the opinion that they are admissible in a Court of Admiralty. Courts of Admiralty are not bound by all the rules of evidence which are applied in the courts of common law, and they may, where justice requires it, take notice of matters not strictly proved. Thus, Dr. Lushington says, in the case of the Peerless, (1 *Ver. Lush.*, 41,) "This Court has, both in prize matters and in civil suits, been accustomed to receive evidence which would not have been admitted in other courts. For instance, affidavits sworn almost in every way, before justices of the peace, commissioners in chancery, &c., even evidence not on oath, as where, according to the custom of some of the States in the north of Europe, the original evidence was not taken on oath, but the person giving it undertook to make oath afterwards, if required. So, from the necessity of the case, all parties interested were, contrary to the laws of other courts at the time, admitted to give evidence in cases of collision, salvage, and others."

The present case seems to be a proper one in which to relax somewhat the strict rules of evidence in favor of these documents, for it is to be noticed that many of the material facts which they tend to prove are shown by other evidence to have taken place; that is to say, it appears by other evidence that the vessel was examined, and was reported on, and was condemned, and was sold at public auction at the time and place mentioned.

The copies have been proved by deposition, for a considerable period of time, and the opposite party is not, therefore, taken by surprise, but has had abundant opportunity of examination, and no suggestion is made that the papers have been falsified. The papers themselves, when examined, have all the appearances of being true copies. There is nothing unusual or suspicious in

their contents, and they are certified by the consul to be copies of his records. There seems to me, therefore, no necessity to compel the parties to go to the expense of a commission to prove the papers, in order to make them admissible in evidence. How much weight should be given to the various portions of these papers is another question.

Passing then to the main issue of the case, namely, whether the claimant has made it appear that the necessities of the vessel were such as to justify her sale by the master at St. Thomas; I am constrained to say that the proofs adduced do not satisfy me that there was any such necessity as to justify the condemnation of the vessel. The fact that the only witness produced to prove the necessity is the party who bought the vessel, and is the claimant here, and that he took part as a surveyor in the proceedings which resulted in the condemnation; that he was also connected in business with the parties to whom the master consigned the vessel in St. Thomas, and that one of these parties made the bids for him at the auction, are sufficient to raise a serious doubt as to the good faith of the proceedings, which is reduced almost to a certainty by the evidence in the case in regard to the condition of the vessel when sold, and the further fact, that one of the ship-masters, who was upon the first survey, says that he signed his report in blank, and refused to be on the subsequent surveys, "because he didn't like the looks of things."

In such a state of the proofs, it must be held that the sale has not been sustained. The result, therefore, is, that the libellant, in one case, is entitled to a decree, with an order of reference to ascertain the amount.

An examination of the account sued for in the other case, however, discloses certain items which cannot be recovered, no lien arising therefor by the maritime law. It may be referred to the commissioner to ascertain

and report for so much of the account unpaid as shall appear to be entitled to a lien by the maritime law.

For libellants, *F. A. Wilcox.*

For claimant, *Benedict & Benedict.*

Northern District of New York,

JUNE, 1869.

THE SCHOONER TRACY J. BRONSON.

COLLISION IN LAKE HURON.—SCHOONERS MEETING.—MUTUAL FAULT.—INSCRUTABLE FAULT.—APPORTIONMENT.

Two schooners, the Barney and the Bronson, came in collision in Lake Huron. They had been sailing, the Barney, west by north half north, on her port tack, and the Bronson southeast by east half east, on her starboard tack. Each claimed that she was close-hauled, and that the other had the wind free. The helm of the Barney was starboarded and the helm of the Bronson ported, when a collision was seen to be inevitable. The evidence as to the direction of the wind was conflicting, and without preponderance in favor of one side or the other, and it was agreed by both parties that the case must be determined by the 12th article of the Act of 1864, as being one of vessels crossing:

Held, That under that article the Barney must prove satisfactorily, in order to recover full indemnity, that she was close-hauled and that the Bronson was free, and that she had failed to do this;

That, it being impossible on the pleadings and proofs to determine the direction of the wind, or which vessel was close-hauled, the case might be properly considered as one of mutual fault or of inscrutable fault;

That in either case, the damages must be divided;

That the case was, more properly, one of vessels meeting instead of crossing, and should be determined under the 11th article instead of the 12th;

That both vessels should have ported, and as neither ported until the collision was inevitable, both vessels were in fault, and the damages must be divided.

The Schooner Tracy J. Bronson.

HALL, J. This is a case of collision, prosecuted to recover damages for the loss of the schooner F. T. Barney and her cargo, which were sunk by a collision with the Bronson in October, 1868.

The collision occurred in Lake Huron, about five miles from land, and between 12 and 1 o'clock at night.

The Barney was proceeding up the lake, on a course of west by north half north, and the Bronson was coming down the lake, on a course of southeast by east half east,—by their respective compasses. Thus, there was only a difference of a single point in the lines of their respective courses; and, as they were both in the usual track of vessels going up or down the lake, near the place of collision, it is quite likely that the lines of their actual courses were even more nearly parallel.

The libel alleges that the wind was from the south southwest; that the Barney was close-hauled, and on her port tack; that she was kept steadily on her course down to the very instant of the collision, when her helm was put hard down (to the starboard); and that the Bronson struck the Barney, stem on, just forward of the cabin, cutting her down so that she sunk in about fifteen minutes after the collision. The answer states that the wind was from the south; that the Bronson was kept steadily on her course, close-hauled, on the starboard tack, until a very short time before the collision, and when a collision was imminent and unavoidable; that her helm was then ported, and she swung to starboard; and that in a very short time the stem of the Bronson struck the Barney on her starboard side.

The evidence in regard to the angle at which the vessels struck, renders it quite probable that the change of helm by the two vessels, or by one of them, was made at an earlier time than the pleadings would indicate; but there is no means of determining whether the libel or the answer is most nearly correct in respect to the time of the change of helm, or whether the helm of either ves-

sel was changed until it was too late for either, by any change of helm, or otherwise, to avoid the collision.

The evidence given by the crews of the respective vessels is distinct and positive that their own vessel was closehauled on the wind; and the testimony of several other witnesses who were on other vessels in the vicinity of the Barney and Bronson at the time of the collision, and who state their recollections in respect to the direction of the wind, is conflicting and irreconcilable. Indeed, the evidence upon this question is so nearly balanced, that it is impossible to determine to which side the preponderance of the testimony inclines.

A careful examination of the whole testimony has not enabled me to discover any means of determining that the wind was south southwest, as alleged in the libel, or south, as stated in the answer; or that either of the vessels was close-hauled; and, if not most probable, it certainly is not very improbable, that each had the wind one and a half to three and a half points free. In fact, the testimony upon which this case must now be decided, is even more conflicting and unsatisfactory than that ordinarily given in collision cases; and it may also be doubtful what rule of navigation must be held to apply to the case.

It was substantially agreed by the counsel for the respective parties, that the case was within the provisions of the 12th article of the Act of 1864, fixing certain rules and regulations for preventing collisions. This article provides that, "When two sailing ships are *crossing*, so as to involve risk of collision, then if they have the wind on different sides, the ship with the wind on the port side shall keep out of the way of the ship on the starboard side; except in the case in which the ship with the wind on the port side is close-hauled and the other ship free, in which case the latter ship shall keep out of the way."

Under this rule, the libellants, to entitle themselves

to full indemnity, must prove affirmatively and satisfactorily, that their own vessel was close-hauled, and that the Bronson had the wind free. This they have certainly failed to do; and they can only recover a portion of their damages upon the ground that the case is one of inscrutable fault, if article 12 must be held to furnish the rule of decision.

That at least one of the vessels was in fault is clear, and it is quite probable that both were so; and it being impossible, upon the pleadings and proofs, to reach any satisfactory conclusion in regard to the direction of the wind, or to determine which, if either, of the vessels was close-hauled, the case may, under the 12th article before referred to, be properly considered as one of mutual fault, or else one of inscrutable fault—requiring, in either case, a division of the damages. Indeed, such must be the decision if the case is disposed of under the 12th article. (1 *Conkling's Admiralty*, 378–382, and cases cited; *Code de Commerce*, art. 407.)

I am the more willing to make this disposition of the case because I think the 11th article, and not the 12th, should furnish the rule of decision.

This 11th article provides that, "if two sailing ships are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other;" and it is quite clear, that although one of the colliding vessels might have been properly considered as nearly close-hauled, or as "running with a good full," neither was so close to the wind that a slight change to starboard might not have been made without going about, or being thrown in stays; and that, therefore, the vessel on the starboard tack was not relieved from the duty of porting her helm by the provisions of the 19th article. *The Princessan Lovisa* v. *The Artemas*, *Holt's Rule of the Road*, 75–77.

The libel states that the light of the Bronson, when first seen, was on the Barney's starboard bow. The

libellant's proof is that it was seen about a point or a point and a half off that bow; yet, as the libel states that the light seen was a green light, and that her red light was not seen until a very short time before the collision, and when a collision was inevitable, this, with the whole testimony in the case, shows that the light of the Bronson was probably first seen more directly ahead of the Barney than would be inferred from the statements of her witnesses alone. The pleadings and proofs on the part of the claimants, show that the red and green lights of the Barney were both seen at the same time, and nearly ahead, or about a half a point off the Bronson's port bow; and the proof in behalf of each vessel is that her own course was not changed until a collision was inevitable.

Under such circumstances, and under all the proofs in the case, I think these vessels were meeting end on, or nearly end on, as provided for in article 11, and that they were not crossing, as provided for in Rule 12.* I am also strongly inclined to think that neither was running as close as possible to the wind, and as neither ported her helm in time, both must be held in fault. (*The Princessan Lovisa* v. *The Artemas, Holt's Rule of the Road*, 75; *The Amalia* v. *The Catharina Maria, ibid.* 87.)

The damages sustained by the two vessels will be aggregated, and then equally divided between them.

For libellants, *Geo. Willey.*

For claimants, *G. B. Hibbard.*

* That the case comes under the 11th article referred to, see *The Nichols*, 7 *Black's Rep.* 656.

Southern District of New York,

JULY, 1869.

IN THE MATTER OF JOHN F. SCHEPELER, JOHN D. SCHEPELER, AND LEON ROSENPLAENTER, INVOLUNTARY BANKRUPTS.

Notice to Creditors.—New Warrant.

Where, on the return day of a warrant in involuntary bankruptcy, proof was made of the publication of notices to the creditors, but not of the service of such notices, and the bankrupts showed that they had not been able to prepare schedules, and asked for further time, which no one opposed, whereupon the register certified the facts to the Court, and asked that a new warrant be issued:

Held, That the register should have adjourned the meeting of creditors, under sections 42 and 12 of the bankruptcy Act, and directed a new notice to be served; but, as he had not done so, the proceedings had fallen through, and there must be a new warrant.

In this case, a warrant was issued, returnable July 20th, 1869, and was on that day returned, with proof of due publication of the notices required, but without any proof of service of notices, and the bankrupts appeared, and showed by affidavit that they had been unable to prepare the schedules, and moved for further time to prepare them, which no one opposed, whereupon the register certified the facts to the Judge, and asked that a new warrant should be issued, returnable at a later day.

Blatchford, J. The proper course, in this case, was for the register, under sections 42 and 12, to adjourn the meeting of creditors to a day certain, on the ground that the notice to the creditors had not been given as

required in the warrant, and to direct the giving, for the adjourned day, of a new notice, in respect of the serving by mail or personally, but not in respect of the publication; but, as there has been no adjournment, the proceedings have fallen through, and there must be a new warrant.

AUGUST, 1869.

IN THE MATTER OF THOMAS S. SHEPARD, A BANKRUPT.

Copartnership Assets.—Petition by Assignee of one Member of a Firm.

C., a member of a firm, transferred to S., his partner, by a written instrument, all his interest in the firm property, to be applied to the payment of the partnership debts, the assignment stating that the firm was dissolved, "except so far as it may be necessary to continue the same for the final liquidation and settlement of the business thereof." S. thereafter made an assignment of all the firm property, in trust, to pay creditors, with preferences, which assignment was afterwards, in a suit brought by creditors, in the Superior Court of the city of New York, set aside, as fraudulent and void, as against such creditors, and the assignee was directed to pay the creditors' claims out of the proceeds of the assigned property in his hands, and did so, and also paid other preferred debts, leaving but a small balance in his hands. Thereafter, on the application of another creditor, S. was declared a bankrupt, in a proceeding against him alone, and the assignee in bankruptcy filed a petition against the assignee of S., praying to have that assignment set aside as void, under the 35th and 39th sections of the bankruptcy Act, and to have the property which came to his hands under it, delivered up to the assignee in bankruptcy:

Held, That the transfer from C. to S. did not dissolve the firm, and the property remained partnership property till the partnership debts were paid;

That there must be an adjudication of bankruptcy against the partners composing the firm, before any step could be taken in bankruptcy to reach the partnership assets;

That the petitioner, being the assignee of S. alone, could not call upon any one to account for such partnership property, and that his petition must be dismissed.

In the Matter of Thomas S. Shepard, a Bankrupt.

THIS was a hearing, on proofs taken, on a petition filed by Hiram Fisher, assignee of the bankrupt above named, against Andrew V. Stout. Prior to the 26th of February, 1867, the bankrupt and one William D. Cochran were in partnership, perhaps with two other persons, under the firm name of Shepard & Cochran, in the city of New York. On that day, an instrument in writing was executed by and between Shepard and Cochran, of which the following is a copy: "Memorandum of agreement between Thomas S. Shepard and William D. Cochran, made this 26th day of February, 1867. The partnership heretofore existing between the above named parties, in the business of buying and selling crockery and glass ware, is hereby dissolved by mutual consent—the dissolution to date from this date—except so far as it may be necessary to continue the same for the final liquidation and settlement of the business thereof. The said Cochran hereby sells and transfers to said Shepard all his, the said Cochran's, interest in the assets, stock on hand, accounts, and credits due the firm of Shepard & Cochran, and all other property of said firm. The said Shepard is to apply said property, and the proceeds thereof, to the payment of the partnership debts and the necessary expenses of carrying on the business. Thomas S. Shepard. Wm. D. Cochran." The consideration for this transfer by Cochran to Shepard was $3,000 worth of crockery ware, which Cochran took at the time out of the stock in trade of the firm. On the 5th of March, 1867, Shepard executed and delivered a voluntary assignment to Stout, of all merchandise and other personal property lately owned by the firm, and of all claims and demands due to the late firm, with the books of account and papers relating to the same, being all the property in respect of which Cochran had transferred his interest in the same, as a partner in the firm, to Shepard. The assignment was in trust, to convert the property into money, and collect the claims and demands,

and, after paying the expenses of executing and carrying into effect the assignment, to pay, with the residue, first, the debts specified in Schedule A to the assignment, and second, the debts specified in Schedule B to the assignment, and then all other liabilities for which Shepard was justly liable. The debts specified in the two schedules were all of them, in fact, debts due by the firm of Shepard & Cochran, and were stated to be such in those schedules. Stout accepted the trust, and entered into possession of the assigned property, and realized from sales and collections a little over $21,000. On the 27th of March, 1867, the National Shoe and Leather Bank, of the city of New York, recovered a judgment in the Superior Court of the city of New York, against Thomas S. Shepard and William D. Cochran and the other two alleged partners, as joint debtors, for $15,280.88. An execution issued on such judgment having been returned unsatisfied, the plaintiffs therein brought a suit in eqtity, in the said Court, against the four judgment debtors and Stout, setting forth the recovery of the judgment, and the return of the execution, averring that the debt to the plaintiffs was contracted by the four judgment debtors, as copartners, composing the firm of Shepard & Cochran, setting out the transfer by Cochran to Shepard, and the assignment by Shepard to Stout, claiming that the assignment was, for various reasons stated, fraudulent and void, and praying that it might be set aside, and declared to be fraudulent and void, as against the plaintiffs, and that it might be adjudged that the plaintiffs were entitled to payment of their judgment out of the assets and the proceeds thereof in the hands of Stout, and that Stout pay over the same accordingly. Process in the suit in which the judgment was recovered was served on Shepard, and on him only, and process in the equity suit was served on Shepard and on Stout, and on them only, although in the latter suit an appearance by attorney was put in for all of the

defendants. No answer or defence was put in in either of the suits. On the 13th of June, 1867, a judgment was rendered in the equity suit, setting aside the assignment from Shepard to Stout, declaring it to be fraudulent and void, as against the plaintiffs, and adjudging that the plaintiffs were entitled to payment of their judgment for $15,280.88 out of the assets assigned to and in the hands of Stout, and directing Stout, as such assignee, to pay the amount of the judgment out of the said assets, or the proceeds thereof in his hands. Stout, on the 14th of June, 1867, as such assignee, paid to the plaintiffs the amount so decreed to be paid. He also, before the 13th of June, 1867, paid out of the assets assigned to him all the claims specified in Schedule A to the assignment, the debt to the Shoe and Leather Bank having been itself one of the debts specified in that schedule. There still remained in his hands the sum of about $1,700, which he claimed to be entitled to retain, and apply to the purposes of the assignment. On the 3d of July, 1867, the Mechanics' Bank of Brooklyn, as a creditor of Shepard, filed a petition in this Court, praying that Shepard might be declared a bankrupt, for certain acts of bankruptcy alleged in the petition, and, among them, the making of the assignment to Stout. In that proceeding, Shepard was adjudged a bankrupt, and Fisher was appointed his assignee, and the usual assignment of the property of the bankrupt was made to Fisher.

The present petition of Fisher was brought to have the assignment from Shepard to Stout declared null and void, under the provisions of sections 35 and 39 of the bankruptcy Act, and the property which came into his possession under said assignment, or the full value thereof, delivered up to Fisher, as assignee, on the ground that the assignment was made by Shepard with intent to give preferences, when he was insolvent, and so known to be by Stout. The petition was not founded on the preference obtained by the National Shoe and

Leather Bank, by the equity suit in the State Court, or on the payment made by Stout to the bank under the decree in that suit. The petition did not set up such suit or decree, but the answer of Stout to the petition set them up in defence.

For the petitioner, *A. L. Cushing*.

For Stout, *E. L. Fancher*.

BLATCHFORD, J. There is a difficulty in this case, which lies at the threshold of Fisher's right to recover. The agreement of the 26th of February, 1867, whatever effect it may have had to dissolve the partnership between Shepard and Cochran, as to future business and debts to be contracted thereafter, had no such effect as respected the partnership property in which Cochran theretofore had an interest, or as respected the partnership debts named in that agreement, or as respected proceedings under the bankruptcy Act to affect such partnership property. The agreement expressly declares, that there is to be no dissolution of the partnership, so far as it may be necessary to continue the same for the final liquidation and settlement of the business thereof; and the transfer to Shepard of Cochran's interest in the property of the firm is expressly made subject, by the agreement, to the trust, that Shepard is to apply the property, and the proceeds thereof, to the payment of the partnership debts. The case is not one where the transfer of the interest of the retiring partner in the partnership property is absolute, and the remaining partner merely agrees to pay and assumes the debts of the partnership, as was done in *Robb* v. *Mudge*, (14 *Gray*, 534.) In the present case, Cochran took from Shepard an express agreement that the partnership property assigned, and its proceeds, should be applied by Shepard to pay the partnership debts, and the agreement made

by Shepard was to pay those debts with that property. Therefore, as respected Cochran and the creditors of the firm, there was no dissolution of the partnership, and no such transfer to Shepard as would make the property his individual property, until and unless the partnership debts were first paid. This being so, there must be an adjudication of bankruptcy against the partners composing the firm, and an assignee must be appointed in such a proceeding, before any step can be taken to reach in bankruptcy the partnership assets. Shepard alone has been adjudged a bankrupt. As there are partnership assets, the partnership continues, as respects proceedings in bankruptcy. Under the provisions of section 36 of the Act, the copartnership property cannot be taken and administered by the bankruptcy Court, unless all the persons who have an interest, as copartners in such property, are adjudged bankrupt. In order to reach such property, it is necessary, under section 36, that Fisher shall have been appointed assignee in a proceeding against all of such copartners. He is only the assignee of the individual and separate estate of Shepard, in a proceeding in bankruptcy against Shepard alone. He shows, therefore, no title to call Stout, or any one else, to account in respect of the property which purported to have been assigned by Cochran to Shepard, and by Shepard to Stout.

These views dispose of the case, without reference to any of the other questions raised or discussed. It is not necessary to decide whether any other persons than Shepard and Cochran were members of the firm, as, on the status of the partnership property, as left by the agreement between Shepard and Cochran, it is immaterial whether or not there were other partners in the firm. The petition must be dismissed, with costs.

AUGUST, 1869.

IN THE MATTER OF DAVID H. CRAIG, A BANKRUPT.

EVIDENCE.—EXAMINING BANKRUPT.

On the examination of a bankrupt, by a creditor whose debt accrued in 1856, the bankrupt objected to questions relating to property held in his name previous to that time, which he claimed to have belonged to his wife:
Held, That the questions must be answered.

IN this case, the bankrupt was under examination, at the instance of Mahlon Vail, a creditor, who had obtained a judgment against him in 1869, upon an indebtedness incurred in 1856. Questions were put to the bankrupt touching money loaned by him to H., previous to 1856; also, as to what property the bankrupt's wife had previous to 1856, and whether she derived any of it from him. The bankrupt, by advice of counsel, declined to answer the questions, and the Register certified them to the Court, with his opinion that they were pertinent and proper.

BLATCHFORD, J. I concur with the Register in his view.

AUGUST, 1869.

IN THE MATTER OF H. E. DIBBLEE *et al.*, INVOLUNTARY BANKRUPTS.

Compounding Doubtful Debts.

The bankruptcy Act does not authorize the Court to empower an assignee in bankruptcy to compound all doubtful debts, with the consent and approbation of a committee of creditors.

In this case, at the first meeting of creditors, a resolution was passed requesting the Court to make an order that the assignee in bankruptcy be authorized and empowered to compromise and compound any and all doubtful debts due to the bankrupts, with the consent and approbation of a committee of the creditors named.

The Register certified the matter to the Court, with his opinion that the order asked for might be granted, under the 43d section of the bankruptcy Act.

Blatchford, J. I do not think that the order asked for is warranted by the provisions of section 43, or of any other section of the Act, or of General Order No. 17.

AUGUST, 1869.

IN THE MATTER OF ISAAC ULRICH AND OTHERS, BANKRUPTS.

JURISDICTION.—WITHDRAWING APPEARANCE.—BILL AND PETITION.—PLEADING.

The general appearance of a party to a suit *in personam* waives all irregularities in the service of process, and confers jurisdiction so far as the person is concerned.

Such jurisdiction, when once conferred, cannot be withdrawn by the act of the party who has so appeared, without the consent of the Court, or of the prosecuting party.

On a petition by an assignee in bankruptcy, seeking to set aside transfers of property by the bankrupts to K., the Court made an order requiring K. to show cause why the prayer of the petition should not be granted, which order was personally served on K., in Illinois. Thereupon a general appearance for K., by an attorney, was filed with the clerk of the Court, and served on the attorney for the petitioner, and proceedings on the order to show cause stood over for the party to answer. On the adjourned day, the attorney for K. filed a withdrawal of his appearance for K., stating that the same had "been made by mistake":

Held, That the attorney had no right to withdraw such appearance without application to the Court for leave to withdraw it, and that the Court had jurisdiction over K. to grant the relief prayed for against him;

That the objection that the relief sought must be obtained by bill, instead of on petition, was one which could be waived, and must be held to have been waived, if not taken by pleading.

BLATCHFORD, J. The prayer of the petition of the assignee in bankruptcy in this matter is, that an assignment, alleged to have been made by the bankrupts to one Gustav Kaufman, on the 11th of January, 1869, two months and sixteen days before the adjudication of bankruptcy herein, and when the bankrupts were insolvent, of certain goods, wares, and merchandise, with intent to give a preference to certain of their creditors,

and a transfer alleged to have been made by the bankrupts, when insolvent, to the firm of Steiner & Brother, at the same time, of certain goods and merchandise, with intent to give a preference to Steiner & Brother, as creditors, Kaufman and Steiner & Brother having reasonable cause to believe that the bankrupts were insolvent, and that the assignment and transfer were made in fraud of the bankruptcy Act, and to prevent the property from being distributed thereunder, and to defeat the provisions thereof, may be adjudged void, and that so much of the property as is not excepted from the operations of the Act, may be delivered to the petitioner as assignee.

Kaufman and Steiner & Brother having been personally served, at Peoria, Illinois, on the 6th of July, 1869, with an order, made by this Court on the 25th of June, 1869, requiring them to show cause before this Court, on the 15th of July, 1869, why the prayer of the petitioner should not be granted, appeared in this Court, on the last-named day, on the return of the order, each by a separate attorney of this Court, and a written appearance for each, by his attorney, entitled in this matter, was, on that day, entered and filed with the clerk of this Court, the notices of appearance so filed being each of them addresssed to the clerk of the Court, and to the attorney for the petitioner in said petition. The matter then stood over for the parties so appearing to answer the petition. On the 29th of July, Steiner & Brother put in an answer, denying the receipt by them of any property on account of the bankrupts, in respect of any indebtedness of the bankrupts to them. On the same day, the attorney who had appeared for Kaufman filed, in the office of the clerk of this Court, a paper entitled in this matter, and signed by himself, but not addressed to any person, and reading as follows: "I hereby withdraw my appearance in behalf of Gustav Kaufman in the above-entitled matter, the same having been made

by mistake." Kaufman has put in no answer to the petition, and claims that his appearance has been legally and properly withdrawn, and that this Court has now no jurisdiction over him, and that the service on him, in Illinois, of the order issued by this Court, was of no avail to confer on this Court jurisdiction over his person.

There can be no doubt that this Court has jurisdiction, by virtue of the first section of the bankruptcy Act, to adjudicate in regard to the matters set up in the petition, in respect to both of the adverse parties, provided it obtains jurisdiction over their persons. The bankruptcy proceeding was instituted in and is pending in this Court. The object of the petition by the assignee is to collect assets of the bankrupt, and to ascertain and liquidate liens and specific claims on such assets. The jurisdiction of this Court in such a case, under the first section of the Act, is established by the decision of the Circuit Court for this district. (*In re The Kerosene Oil Co.*, 6 *Blatchf. C. C. R.*, 521.) The question whether such jurisdiction shall be exercised in a plenary suit commenced by bill in equity, or in an informal and summary way, by a petition filed as a part of the case in bankruptcy, the adverse party being brought into court by personal service or by voluntary appearance, is one which such adverse party may raise, if he chooses, or may waive. It is a question as to the form of proceeding, and not one which affects the jurisdiction of the court as to the subject-matter of the controversy, provided the adverse party is brought into court, or comes into court personally, in a proper manner. If such party, when so in court, does not raise, by demurrer or *quasi* demurrer or by answer, any objection to the method of proceeding by petition, he must be held to waive such objection. The objection must be taken in season, and it comes too late if not taken by pleading to the petition, or before the time for pleading to

it has expired. I do not regard the decision of the Circuit Court in the case before referred to, as inconsistent with this view or as covering this point. In that case, the objection to the proceeding by petition was taken at the time the court made an order requiring the party to answer the petition. In the present case, the two adverse parties were required, by the order of this Court, served upon them personally, to show cause, on the 15th of July, 1869, before this Court, why the relief asked for in the petition should not be granted. Both of them appeared on that day by attorney, in the manner before mentioned. Time was given to them until the 29th of July to answer the petition. Steiner & Brother answered it, setting up the defence before-mentioned, but taking no objection to the form of procedure. Kaufman put in no demurrer, plea or answer, and voluntarily suffered his time to do so to expire. He contented himself with putting on the files of the court, on the adjourned day, the attempted withdrawal of his appearance, before referred to. This Court cannot recognize such withdrawal as of any avail. The appearance was by a notice signed by an attorney of this Court, and placed on the files thereof, and addressed to the clerk and to the attorney for the petitioner, and entitled in this matter, and using this language: "Take notice that I hereby appear for Gustav Kaufman in the above matter." This appearance would have been effective to confer jurisdiction over Kaufman in this matter if there had been no previous service on him of any order to show cause. The appearance was thus effective, without reference to the question whether or not, without it, the service of such order in Illinois would have been ineffectual to confer such jurisdiction. The object of process in a suit *in personam* is, to secure the appearance of the party, and his general appearance waives all irregularities in the service of such process, and confers jurisdiction so far as the person is concerned. That jurisdic-

tion, when thus once conferred, cannot be withdrawn by the act of the party who has so appeared, without the consent of the court or of the prosecuting party. No such consent has been given or applied for in this case. The allegation by the attorney, in the notice of withdrawal, that the appearance was put in by mistake, and that it is withdrawn for that reason, is of no avail. It is not stated whether the mistake was one of law or one of fact. If it was one of law, the party making it must abide its consequences. If it was one of fact, the court must pass upon the existence and pertinence of the fact, and allow the withdrawal, on previous notice to the prosecuting party. It is clear, therefore, that this Court has jurisdiction over Kaufman, by his appearance; that his withdrawal of appearance is unavailing; that he has waived all objection to the form of proceeding; that the court has jurisdiction of the subject-matter of the petition; and that the petitioner is entitled to a decree against Kaufman for the relief prayed for. This Court has jurisdiction, also, over Steiner & Brother by their appearance and answer, and they have waived all objection to the proceeding by petition. A reference must be had to take testimony as to the issue raised by such answer.

A. R. Dyett and *B. C. Thayer*, for the petitioner.

J. B. Bullock, for Kaufman.

Kaufman, Frank & Wilcoxson, for Steiner & Brother.

AUGUST, 1869.

JOHN SEDGWICK, AS ASSIGNEE IN BANKRUPTCY OF JAMES K. PLACE AND JAMES D. SPARKMAN, *v.* JAMES K. PLACE *et al.*

RECEIVER.—STATE ASSIGNEES.—PRACTICE.

A bill was filed by an assignee in bankruptcy, to set aside an assignment made by the bankrupts when insolvent, and an injunction was granted, in pursuance of the prayer of the bill, restraining the assignees from, in any manner, interfering with the property covered by the assignment; and it appeared that the property consisted in part of claims against other persons, in part of moneys deposited, in part of moneys loaned on notes secured by merchandise, and in part of other property, and that the assignees had, in pursuance of an order of a State Court, given security for the performance of the trusts of the assignment:

Held, That a receiver should be appointed by this Court;

That the assignees had no right to invest the funds entrusted to them, in loans on notes secured by merchandise;

That the security which the assignees had given, under the State laws of New York, was not available in this Court;

That the receiver should take possession of the property, collect all the collectable debts, and sell the merchandise, depositing his collections in the United States Trust Company, as fast as they should reach an amount to be named;

That the plaintiff would be appointed such receiver.

BLATCHFORD, J. The main object of the bill, in this case, is to set aside, as null and void, an assignment made by the bankrupts when insolvent, on the 23d of December, 1867, to the defendants, Lewis W. Burritt, Jr., and Thomas T. Sheffield, of all their property, joint and several, in trust, to convert it into money, and therewith to pay the joint and several debts of the assignors, without preference or priority, except as provided by the laws of the State of New York and of the United States; and also to obtain a decree that certain property, which the bill alleges was conveyed by the

bankrupts in fraud of their creditors, prior to the making of such assignment, vested in the plaintiff, as assignee in bankruptcy, as against the defendants, notwithstanding the execution of the assignment of December 23d, 1867. The bill prays for a receiver, pending the suit, of the property transferred to, or in the possession of, the defendants, and of the proceeds thereof. The bill avers fraud in fact, and makes allegations which, uncontradicted, show that the property in question was assigned and conveyed by the bankrupts in fraud of their creditors, and with intent to hinder, delay, and defraud their creditors. An injunction has been issued by this Court, in pursuance of a prayer in the bill, restraining the assignors and assignees from disposing of, or in any manner interfering with, the property or rights of action purporting to be conveyed, created or affected by the said assignment, and from setting up or asserting, as against the plaintiff, any title to or right of action for any property conveyed by the bankrupts prior to December 23d, 1867, in fraud of their creditors. The plaintiff now moves for the appointment of a receiver. The merits of the case were not discussed on the motion, as the time for the defendants to put in their answers to the bill had not expired, and they were not held to deny by affidavit the allegations of fact in the bill. The only question argued was, whether, in view of the injunction issued by the Court, and the status of the property in the hands of Burritt and Sheffield, the voluntary assignees, the safety of such property and the interests of the parties, whoever in the end might be entitled to it, required that a receiver should be appointed. The voluntary assignees produced a statement of the present condition, in their hands, of the property assigned to them, and showed that they had, in pursuance of an order of a State Court of New York, given, under a statute of that State, security for the performance of their trust as assignees, in the sum of $320,000. The plaintiff showed, by his affi-

davit, that there is in the hands of Francis Skiddy, as assignee in bankruptcy of the Place Sugar Refinery, a large sum of money, consisting of dividends upon an indebtedness due from the Place Sugar Refinery to the bankrupts, and that the payment of such dividends is withheld by said Skiddy, on account of the conflicting claims thereto of the plaintiff and of the defendants Burritt and Sheffield; and also, that George F. Gilman is indebted to the bankrupts in the sum of from fifteen to twenty thousand dollars, payment of which he has withheld on account of such conflict; and that he, the plaintiff, believes that the estate of the bankrupts will suffer loss and depreciation, unless a receiver is appointed to collect the said and other demands. The statement produced by the voluntary assignees shows that the property in their hands consists of $55,000 of cash, in currency, which is deposited with the United States Trust Company, on interest; $40,000 cash, in currency, loaned to Gibson, Beadleston & Co., of New York, on $40,000 of United States bonds, which are deposited with the Long Island Safe Deposit Company, of Brooklyn; $12,510.02 of cash, in currency, which is loaned temporarily on notes secured by deposit of merchandise; $6,718.55 cash, in gold, on special deposit in bank; 1,463 bags and packages of coffee, stored in New York and Salem, valued at $14,222.11, gold; 922 packages and bags of ginger, stored in New York, valued at $6,658.21, gold; 157 half chests of tea, valued at $3,280.55, gold; sundry shares of bank stock and insurance company scrip, valued at $17,820; the claim against the Place Sugar Refinery, amounting to $56,807.28; the claim against Gilman, amounting to $15,682.45; $84,570 03 of debts, due in currency, put down as worthless; $23,563.99 of debts, due in currency, put down as doubtful or disputed; $55,670.93 of debts, due in gold, put down as doubtful or disputed; $31,811.90 of debts, due in currency, put down as due from debtors who have gone into bank-

ruptcy, other than the debt due from the Place Sugar Refinery; $201.75, due in gold, from a debtor who has gone into bankruptcy; $54,983.82 of debts, due in currency, other than the debt from Gilman, and $3,466.75, due in gold, which are not put down under any one of the above heads, $455.00 of the $54,983.82 being stated to be secured, $1,992.61 of the same being stated to be in the hands of attorneys for collection, $3,929.31 of the $23,563.99 being stated to be in suit, and the amount due from Gilman being stated to have been ordered by a State Court of New York to be deposited in such Court, in a suit brought against Gilman by the said voluntary assignees to recover the amount. The above are assets of both of the bankrupts jointly. In addition, there are in the hands of the voluntary assignees, assets of the bankrupt Place, individually, to the nominal amount of $5,420.75, and assets of the bankrupt Sparkman, to the nominal amount of $79,015.62.

On the foregoing facts, it is apparent that the appointment of a receiver is not only proper, but necessary. By the injunction granted by this Court, on the bill, and which the defendants have not moved to vacate or modify, the voluntary assignees are restrained from, in any manner, interfering with the property in question. They, therefore, cannot lawfully collect any of the debts, or realize any of the assets; nor can they meddle with the property, even to secure it from loss. The fact that they have loaned a portion of the money in their hands, on notes secured by a deposit of merchandise, shows that they are improper custodians of trust money. No trustee has a right to make such an investment of trust funds. The security which they have given, under the State law of New York, is not available in this Court; and, notwithstanding the injunction, they have full power over the funds and property in their hands. A receiver who will represent the conflicting titles to the property, ought to be put into possession of it, that he

may effectually collect all the debts which are collectable, and sell, if necessary, with a clear title, the merchandise on hand. The receivership ought to be extended over all the moneys and property named in the statement of the voluntary assignees, as well the money on deposit in the United States Trust Company, as the other money and property. The $52,510.02 loaned, ought to be called in, and be, with the $55,000 and the $6,718.55 gold, deposited in the United States Trust Company, by the receiver, to the credit of this cause, on interest, subject only to the order of this Court. As to the residue of the property, the receiver must give adequate security, in an amount to be fixed, on notice to all parties, for the faithful discharge of his duties; and he must be required to deposit his collections in the United States Trust Company, on interest, as fast as they reach an amount to be fixed in the order. The appointment of the plaintiff as receiver is asked for by creditors of the bankrupts, of high business standing and worth, and he will, accordingly, be appointed.

F. N. Bangs, for the plaintiff.

W. M. Evarts, *T. C. T. Buckley*, and *A. H. Wallis*, for the defendants.

AUGUST, 1869.

IN THE MATTER OF HENRY B. MONTGOMERY, A BANKRUPT.

Payment of Fees of Bankrupt's Attorney by Assignee.

Where, in involuntary bankruptcy proceedings, the attorney for the bankrupt petitioned the Court for the payment of his bill for services in the matter, out of the funds in the hands of the assignee, and the Register certified that such

In the Matter of Henry B. Montgomery, a Bankrupt.

services had saved the estate considerable expense, and recommended the payment of the bill:

Held, That, if the assignee should, in writing, approve of the payment, on the grounds set forth, an order would be made allowing the payment.

IN this case, which was a proceeding in involuntary bankruptcy, the attorney for the bankrupt presented to the Court a petition for the payment of his bill for services rendered in the matter, setting forth that, by his advice, the bankrupt had not opposed the proceedings, whereby a long litigation was saved to the creditors; that he spent much time in preparing the schédules of the bankrupt's debts and property; that, by his advice, property which had been transferred by the bankrupt, had been surrendered to the assignee, to the amount of some $6,000; that the bankrupt had no property; and that the attorney would be unpaid for his services, unless his bill was paid out of the moneys in the hands of the assignee. He prayed for an order directing such payment. Accompanying the petition was a certificate of the Register, as follows: "I think that the services and advice of Mr. Olney has saved the estate, in the above matter, considerable expense, and expedited the conversion of the estate into money; and, if consistent with the practice in like cases, I would recommend the payment of the above bill out of funds in the hands of the assignee."

BLATCHFORD, J. If the assignee shall, in writing, approve of the payment of this bill out of the funds of the estate, on the grounds set forth in the petition of Mr. Olney, and in the certificate of the Register, and of the amount of the charges, an order will be made allowing its payment.

AUGUST, 1869.

IN THE MATTER OF ISRAEL M. ROSENBERG, A BANKRUPT.

Removal of Property after Assignment.

Where property, which had been mortgaged by the bankrupt in such wise as to constitute the mortgage a valid security as against the assignee, under the 14th section of the bankruptcy Act, was taken, by an assignee of the mortgage, from the possession of the bankrupt, after the appointment of the assignee in bankruptcy:

Held, That, from the time of the appointment of the assignee, the possession of the property by the bankrupt was the possession of it by the assignee;

That the taking of it was unlawful, and that it must be restored to the assignee, or, if any part of it was not restored, the parties concerned in taking it must account for its value as of the time when it was taken.

BLATCHFORD, J. The bankrupt filed his voluntary petition in bankruptcy in this Court, on the 24th of December, 1868. Horace Bedell was appointed his assignee on the 3d of February, 1869. In October, 1868, Mrs. Adele Gilbert loaned to the bankrupt the sum of $250, no time of repayment being agreed upon. On the 17th of December, 1868, she loaned to the bankrupt the further sum of $1,000, on the security, then and there given, of a chattel mortgage, executed by the bankrupt to her, on certain household furniture of his. The loan of the $1,000 was made on the condition that the mortgage should secure the payment not only of the $1,000, but of the $250 previously lent. The mortgage was so drawn, and the amount secured by it was made payable on demand, and it was duly filed in the proper office. On the 5th of February, 1869, the mortgagee demanded payment from the bankrupt of the amount secured by the mortgage. On the 8th of February, 1869, Mrs. Gil-

bert assigned the mortgage to Joseph A. Salomon, and Salomon then and there paid to her, as the consideration therefor, the sum of $1,250. Subsequently, Salomon obtained possession of the mortgaged property, it having been removed from the possession of the bankrupt without the consent or knowledge of the assignee in bankruptcy. What has since become of the property does not appear. The assignee in bankruptcy now presents a petition to this Court, claiming that the mortgage is void as to the creditors of the bankrupt, and praying that it may be set aside as fraudulent and void, and that the property may be put into his possession, and be sold for the benefit of the creditors of the bankrupt. Mrs. Gilbert and Salomon and the bankrupt have appeared, and answered the petition, and proofs have been taken, on a reference for that purpose.

The mortgage to Mrs. Gilbert, so far as concerns the $1,000 of the amount secured by it, is not shown not to have been made in good faith. It was made for a then present consideration of $1,000 loaned, and was given as security for the debt thus created, and was, in all respects, otherwise valid, and was recorded pursuant to the statute of the State of New York. It must, therefore, under the 14th section of the bankruptcy Act, be held to be a valid mortgage, as against the assignee in bankruptcy, so far as $1,000 of the amount secured by it is concerned. As to the $250 covered by the mortgage, I think the evidence fails to show that Mrs. Gilbert had reasonable cause to believe, when she received the mortgage, that it was made in fraud of any provision of the bankruptcy Act. It must, therefore, stand as a valid mortgage for the whole amount secured by it. But, while the amount secured by the mortgage must be paid out of the proceeds of the property, if they are sufficient for that purpose, the property itself must be sold in such manner as to realize the largest possible amount. It passed to the assignee in bankruptcy, and the title to

it vested in him as of the 24th of December, 1868. The debt was not demanded from the bankrupt, nor was any action taken by the mortgagee to disturb the status of the property, until after the assignee was appointed. From the time of the filing of the bankrupt's petition, the property was in the custody of the Court, and, at least, from the time of the appointment of the assignee, the possession of it by the bankrupt was, in law, the possession of it by the assignee. The taking of any of it under the mortgage was, after that time, unlawful, and a taking of it from the custody of this Court, and of an officer thereof. Its value must be accounted for as of the time it was taken. It appears by the bankrupt's schedules that the value of the property exceeds the amount of the mortgage. The assignee in bankruptcy has a right to sell the property, if it can be restored to him *in specie*, and retain the surplus of its proceeds, after paying the mortgage. If it, or any part of it, shall not be restored to him, the defendants concerned in taking it, or such part of it, must account to the assignee in bankruptcy for its value, or for the value of such part of it, as of the time it was taken. If a reference is necessary to ascertain such value, it must be had before the Register in charge of the case. When his report thereon shall be made, the Court will make such order as shall be proper as to the payment of the mortgage.

T. Burwell, for the assignee in bankruptcy.

M. J. Friedlander, for the defendants.

AUGUST, 1869.

IN THE MATTER OF THE McDERMOTT PATENT BOLT MANUFACTURING COMPANY, INVOLUNTARY BANKRUPTS.

What is Commercial Paper.

A note and a due bill given for money loaned to a manufacturing company, payable on demand, is not "commercial paper" within the meaning of the 39th section of the Bankruptcy Act.

The object to which the money borrowed was applied, cannot affect the character of the instrument given as evidence of the indebtedness.

BLATCHFORD, J. The alleged act of bankruptcy in this case is, that the company, a corporation, on the 10th of March, 1869, being a merchant and trader, fraudulently stopped or suspended and did not resume payment of its commercial paper within a period of fourteen days. Such paper consists of two instruments. One is a promissory note, dated November 12th, 1868, and signed by the president and secretary of the company, and reading as follows: "On demand, after date, we, the McDermott Pat. Bolt Mfg. Co. promise to pay to the order of John E. Walsh, three hundred dollars, at the office of Co. Value received." The other is a receipt or due bill, signed by the treasurer of the company, and in the words following: "Received, New York, Nov. 7, '68, from Mr. J. C. Brinck, Two Hundred $\frac{00}{100}$ Dolls. for the McDermott Pat. Bolt Manufg. Co. as a loan for their use, the same to be returned, due on demand." I do not think that, on the facts proved in this case, either of these instruments can be regarded as "commercial paper," within the meaning of those words in the 39th section of the Bankruptcy Act. The consideration of

each of them was a loan of money made to the company by the payee named therein. The consideration was unconnected with merchandise, trade or commerce, or with any mercantile, trading or commercial transaction. The object to which the money borrowed by the company was applied by it, cannot affect the character of the instruments given as evidences of the indebtedness, even though it was previously known to the lenders that the money would be applied to such object. Both of the instruments are payable on demand. The one to Brinck has no feature of negotiability on its face; and, although the note to Walsh is payable to his order, yet, in view of the fact that it is made payable on demand, and of the actual consideration for it, its negotiable form is not sufficient to make it commercial paper, within the 39th section. That section requires that the debtor must be a merchant or trader, and must have fraudulently stopped or suspended payment of his commercial paper. This I understand to mean a fraudulent stoppage or suspension of payment of commercial paper given by him in his character as a merchant or trader. The note to Walsh and the due-bill to Brinck were not thus given.

The petition must be dismissed, with costs to be paid by the petitioning creditors.

John Todd, for the petitioners.

J. D. Taylor, for the debtors.

Northern District of New York,

AUGUST, 1869.

IN THE MATTER OF THE PETITION OF WILLIAM P. SIGSBY *v.* ALEXANDER E. WILLIS.

INVOLUNTARY BANKRUPTCY.—EQUITABLE DEBT.—PARTNERSHIP TRANSACTIONS.—MISAPPROPRIATION OF PARTNERSHIP FUNDS.

The "debt provable under the Act," which a creditor must have as a foundation for a petition in involuntary bankruptcy, may be an equitable demand.

If the nature of the debt is set forth in the petition, which avers that the debt is provable under the Act, the question whether it is so provable is to be determined as a question of law and not of fact.

Where a petition in involuntary bankruptcy averred that the petitioner and the alleged bankrupt had been partners; that the partnership had been dissolved, but no settlement had been made between them, and that the alleged bankrupt was indebted to the petitioner "by reason of such partnership transactions for assets and money of said copartnership," which had come into his hands above his share:

Held, That the allegation was insufficient, and that the petitioner was not entitled to an adjudication upon the facts stated;

A member of a firm which has been dissolved, is not entitled to an adjudication of bankruptcy against his copartner on the ground that he can prove a debt against him in respect to bonds and mortgages given by them jointly, under the 19th section of the Bankruptcy Act;

Nor can he have such an adjudication on the ground of his having a contingent debt against his copartner;

But, if one partner fraudulently misappropriates the partnership funds, the other partner may treat the misappropriation as foreign to the copartnership, and prove the claim as a debt, precisely as though no partnership had existed.

HALL, J. The petition in this case alleges that the petitioner and the alleged bankrupt were partners in business for sometime previous to April 3d, 1869, and that on that day their copartnership was dissolved; that no settlement has been made between them, but that

the alleged bankrupt is indebted to the petitioner "*by reason of such partnership transaction for assets and money of said copartnership* which have come into the hands of said Alexander E. Willis over and above his share thereof, and otherwise, in the sum of about seven thousand dollars;"—and this is the alleged indebtedness upon which the petition is based.

On the return of the order to show cause, it was insisted that a debt of the character of that thus set forth would not support a petition in bankruptcy against the debtor; there being no legal debt for which an action could be maintained at law, but only a right to compel an account in a court of equity.

Under the earliest English bankrupt Acts, this objection would have been fatal. Under these Acts it was held that debts recoverable in a court of equity only, would not support a commission in bankruptcy, even though provable for the purposes of a dividend; and that one partner could not petition against another partner in respect to any indebtedness arising out of the transactions of the copartnership, unless the debt was such that he might maintain an action at law. (*Christian's Bankrupt Law*, vol. I, 2352–56, notes, and 2 *do.* 475; *Ex-parte Nokes*, 2 *Mont.* 148; *Ex-parte Hillyard*, 1 *Atkins*, 147; s. c. 2 *Vesey, Senr.* 407; *Medlicott's Case*, *Strange*, 899; *Ex-parte Lee*, 1 *P. Williams*, 783; *Murphy's Case*, 1 *Schoales & LeFroy*, 44; *Jeffo* v. *Wood*, 2 *P. Williams*, 128; *Eden on Bankrupt Law*, 42, 43; *Marson* v. *Barber*, *Gow on Partnership*, 17; *Henley's Digest of Bankrupt Law*, 42, 43; *Suttor's Case*, 11 *Vesey*, 163; *Broadhurst's Case*, 19 *Eng. Law and Eq. Rep.* 466; *Windham* v. *Patterson*, 1 *Starkie*, 115.)

The English courts have, however, repeatedly held that an equitable debt might be proved under a commission obtained by another creditor, although such debt would not support a commission. (*James' Bankruptcy*, 87; *Ex-parte Yonge*, 3 *Vesey & Beame's*, 31; *Jeffo* v. *Wood*,

2 *P. Williams*, 128; *Murphy's Case*, 1 *Sch. & Le Froy*, 44; 2 *Christian's Bankrupt Law*, 473, 474); and also, that a solvent partner, winding up the partnership concern, was entitled to prove, under the commission against bankrupt partners, the share of the loss which each partner ought to have borne, as a debt against his separate estate. (*Ex-parte Watson*, 4 *Maddock's Rep.* 477.) And the same rule would appear to be established in this country under the Bankruptcy Act of 1841. (*Butcher* v. *Forman*, 6 *Hill* (*N. Y.*) *Rep.* 583.) In the case last mentioned, the English authorities which support the position that solvent partners of the bankrupt, having paid all the joint debts of the firm, are regarded as standing in the light of *sureties*, or persons liable for him, and therefore entitled to come in and prove in respect to the bankrupt's share of the copartnership debts, (*Eden on Bankruptcy*, 177; *Ex-parte Yonge, V. and B.* vol. 3, p. 31; *Aflalo* v. *Fourdrinier*, 6 *Bingham*, 306,) were approved, and the discharge was said to be a good bar to an action for contribution, when the debt of the firm was paid by the solvent partner after the bankrupt's discharge.

These decisions of the English courts were made under English statutes which are probably different, in some material respects, from our present bankrupt Act, in regard to the persons who may become petitioning creditors. Under our present statute, it is only necessary that the petitioning creditor should have a "debt provable under the Act," to the required amount, and the question to be determined is, whether the debt set forth in the creditor's petition is so provable.

It is averred in the petition that the debt of the petitioner is so provable, but the nature of the petitioner's demand being stated in the manner above set forth, the question to be determined is one of law, and not of fact merely; and the Court is therefore called upon to determine whether such a debt is provable under our present bankrupt Act.

The petition concedes that the indebtedness grew out of the copartnership transactions, and that no settlement has been made between the parties. It does not allege that all the copartnership debts have been paid, or that all the copartnership property has been disposed of; and, as it alleges the indebtedness to be in part for assets of the copartnership, which have come into the hands of the alleged bankrupt, without alleging that they have been disposed of, there is ground for the inference that such assets are still in the hands of the alleged bankrupt. If so, they are liable to the payment of the copartnership debts; and, by a proceeding in equity for an account, and also for a receiver and an injunction, this property may be secured for the payment of joint creditors, in which case, the alleged bankrupt could not be properly charged therewith; nor, in case he should be adjudged a bankrupt, could such assets, if still the property of the copartnership, be charged to him, as between him and his former partner, so as to become the property of the bankrupt, and thus swell his separate estate, out of which his individual or separate creditors would be paid, to the prejudice of the creditors of the copartnership.

Considering these statements of the petition in the light of the English decisions, and also the omission of such allegation as would make the petitioner's debt provable against the separate estate of the alleged bankrupt, under the rules which govern the administration of copartnership and separate estates, in bankruptcy, I am strongly inclined to think that this allegation of the petition is insufficient, and that the petitioner is not entitled to an adjudication upon the facts alleged in his petition. And, in respect to this allegation of indebtedness, the amended petition, heretofore filed, is, in substance, like the originab petition, and gives to the petitioner no stronger case against the alleged debtor.

The petitioner has asked leave to file a supplemental or second amended petition, for the purpose of amplify-

ing and making more particular the statements of the nature of the petitioner's demand against the alleged bankrupt, and this proposed amended petition, which is duly verified, sets out that the petitioner and the alleged bankrupt entered into copartnership about the first day of February, 1867, in the milling and flouring business, and that, at the time of forming such copartnership, the petitioner purchased of said Willis one half of a certain real estate, mill and water privilege, &c., and received a conveyance thereof, and paid said Willis ten thousand dollars therefor; that about the first day of April, 1867, the petitioner and Willis executed and delivered to one Wessel T. B. Van Orden a mortgage upon said real estate to secure the payment of $7,000 and interest, which was due from their said copartnership to said Van Orden, and on which the sum of $7,000 and interest from the 1st day of April, 1869, is still due; that on the 28th of December, 1868, Willis, without the knowledge of the petitioner, executed and delivered to Noble H. Johnson, a mortgage upon said Willis's undivided interest in the premises, for securing the sum of $4,000, being for the individual debt of said Willis; that on or before the 1st day of December, 1868, their said firm became indebted and embarrassed, and effected a compromise with their creditors, by which their creditors agreed to take fifty cents on the dollar of their demands, which said Johnson agreed to pay to such creditors, and that thereupon the petitioner and Willis, to indemnify said Johnson against his said liability, turned over and delivered to him certain accounts and other personal property worth about $5,000, and also, on the 30th of March, 1869, executed and delivered to him their bond and a mortgage upon said real estate, to secure the payment of $3,700; that the said firm now owes no debts, except said seven thousand dollars and interest to said Van Orden, and the said indebtedness to said Johnson, which will not exceed the sum of $6,000; that one-half of said indebt-

edness of $13,000 belongs to Willis to pay, but that the petitioner is legally liable to pay the whole amount that may become due on the mortgage to Van Orden, and said $3,700 to said Johnson upon the bonds given by him as aforesaid; that by reason of said $7,000 given by Willis to said Johnson, and the insolvency of Willis, the petitioner is in danger of being compelled to pay all that may be due on the said $3,700 mortgage to Johnson, &c.

This supplemental or amended petition further states "that without reference to said liability of your petitioner for said Willis's share of said partnership debts, said Willis is indebted to your petitioner in a sum not less than $7,000; that the said Willis had entire charge of the books of said firm, and kept the same falsely and fraudulently; that your petitioner has discovered since the dissolution of said partnership that said Willis, at various times during said partnership, drew funds from the Coxsackie Bank belonging to the said firm amounting to upwards of $8,000, and from the Catskill Bank, funds belonging to the said firm amounting to $7,546, no part of which sums was charged to said Willis, or appeared at all upon the books of said firm, but which sums were, as your petitioner believes, fraudulently appropriated to his own use by said Willis."

It was insisted upon the argument, that the petitioner was entitled to prove a debt against the alleged bankrupt in respect to the bonds and mortgages given by him and the petitioner jointly, under the provisions of the 19th section of the bankruptcy Act, which provides in substance that "any person liable as bail, surety, guarantor, or otherwise for the bankrupt, * * and who has not paid the whole of said debt, but is still liable for the same or any part thereof, may, if the creditor shall fail or omit to prove such debt, prove the same, either in the name of the creditor or otherwise, as may be provided by the rules, and subject to such regulations and limita-

tions as may be established by such rules;" but, as no such rules have been established, and as this provision may not, in any event, be deemed to authorize the party so liable to petition against the debtor, (as it ought, probably, to be held to authorize proof by the party so liable only in a case where the real creditor could prove, and as the creditor could not prove in this case, because he has security upon the property of his debtor,) I am of the opinion that this provision of the statute does not aid the petitioner.

Nor do I think that the petitioner can sustain his position, on the ground that he has a contingent debt or a contingent liability against Willis. It can hardly be supposed that it was intended that a petition against a debtor should be maintained upon the allegation that upon a certain contingency, which might never happen, the party proceeded against would become a debtor. The provision that authorizes an application to the Court to have the present value of the debt or liability ascertained, only authorizes proof for the amount so ascertained; and it is, to say the least, very doubtful whether, in a case like the present, there is any provable debt within the meaning of the statute, until the amount is so ascertained. I should not, therefore, be inclined to maintain the petition on either of these grounds.

The other allegations of the proposed supplemental or second amended petition, remain to be considered. They are not sufficiently full and precise: as it is desirable, if not necessary, that, in such a petition, the precise amounts, and the time of each fraudulent withdrawal and fraudulent misappropriation of copartnership funds, without any entry on the books of the firm, should be specifically alleged, so that a distinct and defined issue can be presented by the respondent's answer; and it should be so drawn, and the original petition be so amended, as not to concede that an indebtedness caused by such fraudulent misappropriation arose out of the

copartnership transactions. This proposed amendment will, therefore, be considered as an affidavit in support of a motion for leave to file proper amendments, setting forth particularly, and in due form, the facts stated generally in the petition; and, in that view, the question whether such an amendment would present a debt or demand on which a petition can be maintained, will be considered.

The fraudulent misappropriation of the copartnership funds, which is charged against Willis, was, of course, wholly unauthorized by the contract of copartnership, and is of the nature of an unrighteous embezzlement of the petitioner's share of such funds; and both common sense and high judicial authority would justify the proof of the amount of the interest of the other parties in such funds, misappropriated by such embezzlement, against the separate estate of the wrongdoer, as having no connection with the general result of all their copartnership business, and as not arising out of their copartnership transactions. (*Ex parte Yonge*, 3 *Vesey and Beames*, 31, and cases there cited.) The partner thus wronged by such dishonest and fraudulent acts of his copartner, is entitled to treat the misappropriation as entirely foreign to the copartnership business, and to prove the debt precisely as though the copartnership had not existed, for in no just sense can a debt created by such fraudulent misappropriation of copartnership funds be considered as arising out of the partnership transactions. Leave to file proper amendments to his petition is, therefore, given to the petitioner, upon the payment of $25 costs, &c., to the respondent, such payment to be made, and the amended petition to be filed, and a copy to be served on the attorney of the respondent within fifteen days from the entry of the order.

M. Hale, of Albany, for the petitioner.

Geo. Gorham, of Buffalo, for the respondent.

In the Matter of Abraham Goldschmidt, a Bankrupt.

Southern District of New York,

SEPTEMBER, 1869.

IN THE MATTER OF ABRAHAM GOLDSCHMIDT, A BANKRUPT.

Assignment by Bankrupt without Preference.—Refusal of Discharge.

A debtor made an assignment of all his property for the benefit of all his creditors, without preferences. More than ten months afterwards he filed his petition in bankruptcy, and his discharge was opposed on the ground that he had made that assignment "in contemplation of bankruptcy," "for the purpose of preventing his property from being distributed under the bankruptcy Act." On being examined, he testified that he made the assignment in good faith, and not in contemplation of becoming a bankrupt; that he was at the time unable to pay his debts, and had suits against him; that he was advised by counsel that he had a right to make such an assignment; and that he had to make it in order to save the property for the creditors generally:

Held, That the effect of the assignment being to hinder and delay his creditors, its execution was an act of bankruptcy, within the 39th section of the Act; that the debtor executed it, therefore, in contemplation of becoming bankrupt, within the 29th section of the Act; and that his evidence that he had no contemplation of becoming bankrupt, was of no weight;

That, on the evidence, he made the assignment for the purpose of preventing the property from being distributed under the bankruptcy Act; and that, therefore, under the 29th section of the Act, a discharge must be refused.

Blatchford, J. In this case, the discharge of the bankrupt is opposed by creditors on a specification alleging that, since the passage of the bankruptcy Act, the bankrupt has, "in contemplation of becoming bankrupt, made an assignment of all his property to David Heller, for the purpose of preventing the said property from being distributed under said Act in satisfaction of his debts," being the assignment referred to in the

schedules annexed to the petition of the bankrupt, as one made by him on the 20th of February, 1868, assigning all his property to Heller, "for the purpose of selling and disposing of the same, and dividing the proceeds thereof share and share alike among his several creditors named in Schedule A No. 3 and No. 5, without preference." This specification is founded on that clause of the 29th section of the Act, which provides, that no discharge shall be granted to a bankrupt if he has, in contemplation of becoming bankrupt, made any assignment of any part of his property for the purpose of preventing the property from being distributed under the Act in satisfaction of his debts. Three things must concur, under this provision, to warrant the refusal of a discharge: (1.) There must have been an assignment of property by the bankrupt; (2.) He must have made the assignment in contemplation of becoming bankrupt; (3.) He must have made it for the purpose of preventing the property from being distributed under the Act in satisfaction of his debts.

That the assignment was made in this case is undisputed. It is in writing, and bears date February 19th, 1868, and is executed by the assignor and the assignee, and was acknowledged by both of them on that day, and was recorded the next day. It states that the assignor "is justly indebted to sundry persons in sundry considerable sums of money, and, being unable to pay the same in full, is desirous of making a fair and equitable distribution of his property and effects among his creditors." It then assigns to Heller all the property of the assignor, in trust to sell and dispose of it, and convert it into money, and, out of the proceeds, after deducting the expenses of executing the trust, to pay all the debts of the assignor *pro rata*, without preferences.

The next question is, whether the assignment was made by the assignor in contemplation of becoming

bankrupt. What is meant by the expression, "in contemplation of becoming bankrupt," as used in this clause of the 29th section? An examination of the Act, in connection with the forms, shows, that the expression, "becoming bankrupt," means, committing an act of bankruptcy, and that the expression, "in contemplation of becoming bankrupt," means, in contemplation of committing an act of bankruptcy. The act of bankruptcy, the commission of which must be contemplated, is such an act as the statute declares to be an act of bankruptcy. By section 11, the filing of a petition by a debtor, under the conditions therein prescribed, is declared to be an act of bankruptcy. By section 39, it is provided that a debtor who does any one of certain specified things, shall be deemed to have committed an act of bankruptcy. Form No. 5, being the form for "adjudication of bankruptcy upon debtor's petition," is a finding and certificate by the Register that the petitioner "has become a bankrupt within the true intent and meaning of the Act"—that is, that he has filed a petition, as a voluntary bankrupt, under the conditions prescribed in section 11, and in compliance with the General Orders and the forms and the rules of this Court. A petition by a creditor, Form No. 54, avers that the debtor "did commit an act of bankruptcy." Form No. 58, which is the form for adjudication of bankruptcy on a creditor's petition, adjudges that the debtor "became bankrupt within the true intention and meaning of the Act, * * * before the filing of the said petition"—that is, that he so became bankrupt by committing the act of bankruptcy alleged in the petition, being an act the doing of which is declared by section 39 to be the commission of an act of bankruptcy. A debtor may, therefore, become bankrupt, or commit an act of bankruptcy, by filing a petition under section 11, or by doing some one of the things which is declared by section 39 to be the commission of an act

of bankruptcy. The question to be determined in this case is, whether the bankrupt, when he made the assignment to Heller, contemplated filing a petition under section 11, or contemplated doing some one of the things which is declared by section 39 to be the commission of an act of bankruptcy. For, it is not necessary, in order that he should have contemplated becoming bankrupt. that he should have contemplated having a petition filed against him, and being adjudged a bankrupt thereon, provided he contemplated committing an act which is defined by section 39 to be an act of bankruptcy.

The petition of the bankrupt in this case, in voluntary bankruptcy, under section 11, was filed on the 28th of December, 1868, ten months and eight days after the recording of the assignment to Heller. There is nothing in the evidence, or in the circumstances of the case, to induce the belief that the bankrupt, when he made the assignment, contemplated filing himself the petition which he afterwards filed, and committing the act of bankruptcy which he thus committed. But he testifies that, at the time he made the assignment, he knew he was not able to pay his creditors in full; that law suits were pending against him at that time, some being at issue; that he was advised by counsel, before he made the assignment, that he had a right to make an assignment of all his property, without preference, for the benefit of all his creditors; that he made it of his own accord, and not on the advice of his creditors, in good faith, for the benefit of his creditors, without intent to defraud any creditor, and not in contemplation of becoming a bankrupt; that he did the best he could with his property for his creditors; and that he had to make the assignment in order to save the property for the creditors generally. Now, by section 39, it is provided, that a debtor who, after the passage of the Act, shall make any assignment of his property with intent to delay, defraud or hinder his creditors, shall be deemed to

have committed an act of bankruptcy, that is, shall be deemed to have become bankrupt. The intent on the part of the bankrupt to delay and hinder his creditors by making the assignment is proved in this case, as a question of fact. The actual design in his mind to so delay and hinder his creditors, is testified to by himself. For he says that, knowing that he was not able to pay his creditors in full, and suits having been brought against him by some of his creditors, and being pending, he made the assignment of his own accord, after advice by counsel, in order to save the assigned property for his creditors generally. This can mean nothing else, than that he made the assignment in order to prevent the creditors who had sued him from appropriating towards the payment of their claims the assigned property. This would be to delay and hinder such creditors. The fact that the bankrupt made the assignment, as he states, without intent to defraud any creditor, is of no consequence, provided he had the intent to delay or hinder his creditors. The language of the 39th section is, "with intent to delay, defraud, *or* hinder his creditors." The testimony of the bankrupt that he did not make the assignment "in contemplation of becoming a bankrupt," is entitled to no weight. What he means by that expression is not defined by him. If he means that he did not make the assignment "in contemplation of becoming bankrupt," in the sense of that expression as used in the clause of the 29th section which is under consideration, and as hereinbefore interpreted, his own testimony, as already shown, proves that he did make the assignment in contemplation of becoming bankrupt. His general negation of the language of the statute is outweighed by his testimony as to facts. If the words used by him, namely, "in contemplation of becoming *a* bankrupt," are intended to mean something different from the words, "in contemplation of becoming bankrupt," and to imply that what he means is, that, when he

made the assignment, he did not contemplate being actually adjudged to be a bankrupt, the answer is, that it was not necessary he should have contemplated the institution of proceedings in bankruptcy against him, provided he contemplated, as he did, the commission of an act which is declared by section 39 to be an act of bankruptcy, and for which he could, under that section, be adjudged a bankrupt, at the option of a creditor, subject to the conditions prescribed in that section.

As, therefore, the bankrupt made the assignment in question with intent to delay and hinder his creditors, and thus committed an act of bankruptcy, he made it in contemplation of becoming bankrupt. The next question is, whether he made it for the purpose of preventing the assigned property from being distributed under the Act in satisfaction of his debts. He avows that he knew he was not able to pay his creditors in full; that he made the assignment of his own accord, under the advice of counsel, to the effect that he had a right to clothe an assignee with the power of distributing his property in satisfaction of his debts; that he thereby did the best he could with his property for his creditors; and that he had to make the assignment in order to save the property for the creditors generally. This shows an intent and a purpose on the part of the bankrupt to assume, when he was insolvent, and when he contemplated committing an act of bankruptcy, and becoming bankrupt, the distribution of his property, in satisfaction of his debts, through the agency of an assignee selected by himself. This necessarily involves the existence of a purpose to prevent the same property from being distributed under the bankruptcy Act in satisfaction of the same debts. There could be no other purpose. Such purpose is not disavowed by the bankrupt in his testimony. On the contrary, his testimony, that he was advised by counsel, before he made the assignment, that he had a right to make it, can only

mean that he was advised that, as against the bankruptcy Act and its provisions, he had a right to make such assignment, and to provide for the distribution of his property in satisfaction of his debts by an assignee, selected by himself, and subject to regulations prescribed by himself in the assignment, and thus prevent, if the assignment should be carried out, the distribution of the same property under the bankruptcy Act. All this he did in contemplation of becoming bankrupt, that is, of committing an act of bankruptcy, because of which a creditor could, subject to the conditions prescribed in the 39th section, put such property, but for such assignment, in the way of being distributed under the Act, against the will of the bankrupt, in satisfaction of his debts.

The fact that the assignment in this case was one of all the bankrupt's property, and created no preferences among his creditors, makes no difference. It was as repugnant to the Act as if it had assigned only a part of his property, or had created preferences. The language of the clause in the 39th section is, "*any* assignment" of his property, with the forbidden intent. It makes no difference what the terms or trusts of the assignment are, or how much or how little of the property of the assignor it conveys. So, the language of the clause in the 29th section is, "*any* * * * assignment of any part of his property," for the purpose defined. The whole includes all the parts, and any one and every one of the parts, and the terms, conditions and trusts of the assignment are of no consequence, provided the forbidden purpose exists.

It follows that the specification is sustained, and that a discharge must be refused.

Brown & Calvin, for the bankrupt.

Charles H. Smith, for the creditors.

SEPTEMBER, 1869.

IN THE MATTER OF GARRETT S. BELLIS AND JAMES MILLIGAN, BANKRUPTS.

EVIDENCE.—ATTORNEY AND CLIENT.

AN attorney was called as a witness by an assignee in bankruptcy, and was asked whether a conveyance was made by the bankrupt to him of certain real estate, and whether he conveyed the same to the wife of the bankrupt, and what was the consideration of the two conveyances. The attorney objected to answering, on the ground that the matter was within the privilege of confidential communication between him and his client. The Register certified the matter to the Court.

BLATCHFORD, J. The questions are not within the privilege of confidential communication between attorney and client, and must be answered.

SEPTEMBER, 1869.

IN THE MATTER OF ELISHA FOSTER, PETITIONER FOR ADJUDICATION OF BANKRUPTCY OF HIMSELF, AND CHARLES C. DAY AND WILLIAM W. PRATT.

JURISDICTION.—PLACE OF FILING PETITION IN BANKRUPTCY.—CARRYING ON BUSINESS.

Where a bankrupt, during the six months previous to filing his petition, carried on business for two months in the Southern District of New York, and, for the

In the Matter of Elisha Foster, Petitioner.

same two months, in the District of Massachusetts, and carried on business no where else, during such six months:

Held, That his petition was properly filed in the Southern District of New York.

BLATCHFORD, J. On the 4th of December, 1868, Elisha Foster filed a petition in this Court, describing himself therein as of the town of Franklin, in the State of Massachusetts. The petition sets forth, that the petitioner and Charles C. Day, of Jersey City, New Jersey, and William W. Pratt, of Medfield, Massachusetts, formed a copartnership in November, 1866, for the transaction of the business of manufacturing and dealing in straw goods, at said town of Franklin and the city of New York, and have carried on said business as such copartners for the longest period during the six months next immediately preceding the filing of the petition, at the city of New York; that the members of said copartnership owe debts exceeding the amount of $300, and are unable to pay their debts in full; that the petitioner is willing to surrender all the estate and effects of said copartnership, and all his separate estate and effects, for the benefit of the creditors of said partnership, and of his separate creditors; that the said Day and Pratt are respectively unwilling to join in the petition; that the petitioner desires to obtain the benefit of the bankruptcy Act; that Schedule A to the petition contains a statement of all the debts of the copartnership; that Schedule B thereto contains an inventory of all the estate of said copartnership; that Schedule C thereto contains a statement of the petitioner's individual debts; and that Schedule D thereto contains an inventory of his individual estate. The prayer of the petition is, that the petitioner and Day and Pratt may be adjudged to be bankrupts, and that the petitioner may have a certificate of discharge. On the filing of this petition, an order was made requiring Day and Pratt to show cause why they should not be adjudged bankrupts. On the return day of such order, each of them put in an

answer, denying the allegation of the petition that Foster, Day and Pratt had carried on business as co-partners, as alleged, in the city of New York, for the longest period during the six months next immediately preceding the filing of the petition, and denying the jurisdiction of this Court to grant the prayer of the petition. Evidence has been taken on the issue thus raised.

The copartnership of Foster, Day and Pratt was formed in November, 1866, and thenceforth, until the 4th of August, 1868, carried on the business of manufacturing and buying and selling straw goods, the manufacturing being done in Massachusetts, and the buying and selling in the city of New York, and in Massachusetts, the largest portion of the sales being made in the city of New York. The copartnership was dissolved on the 4th of August, 1868, and thenceforward ceased to carry on business. Consequently, it carried on business in the city of New York for only two months of the six months next immediately preceding the time of the filing of the petition. By section 11 of the Act, it is necessary to jurisdiction, that the petition be addressed to the judge of the judicial district in which the debtor has resided or carried on business for the six months next immediately preceding the time of filing the petition, "or for the longest period during such six months." The sole question in this case is, whether this Court has jurisdiction to entertain the petition of Foster, and, under it, to adjudge Foster, Day and Pratt to be bankrupts. Schedule B to the petition shows that there are assets of the copartnership. The members thereof continue, therefore, for the purposes of section 36 of the Act, to be partners in trade *quoad* their creditors, and they may, under that section, be adjudged bankrupt on the petition of any one of them, the others, if they refuse to join in the petition, being brought into Court by proper process, under the provisions of General Order

In the Matter of Elisha Foster, Petitioner.

No. 18. As the petition of Foster, filed in this Court, that the three copartners may be adjudged bankrupt, was the first petition filed in any Court for that purpose, it follows, under section 36 and General Order No. 16, that this Court, if it has jurisdiction of such petition, is entitled to take and retain exclusive jurisdiction over all proceedings in regard to the bankruptcy of all three of the copartners until the same shall be closed. The question then recurs, whether this Court has jurisdiction of the petition of Foster. It has such jurisdiction, if the three copartners have carried on business in this judicial district for the longest period during the six months next immediately preceding the 4th of December, 1868. This involves a determination as to the meaning of the expression, "the longest period" during such six months. It is contended, on the part of Day and Pratt, that the longest period during the six months must be more than three months in duration, and that, therefore, the two months in this case, from the 4th of June, 1868, to the 4th of August, 1868, during which the copartnership carried on business in this judicial district, is not such longest period. It is urged, that two months can never be the longest period during the six months; that three months and a day is the shortest time that will answer the requirement of the longest period during the six months; and that the expression, "the longest period during such six months," means, the longest part of such six months. I cannot assent to this view. The meaning of the 11th section is, I think, that the debtor may file his petition in the District in which he has resided or carried on business for the six months next immediately preceding the time of filing the petition, or for the longest period during or within such six months that he has resided or carried on business in any district. Any other interpretation would wholly exclude a class of debtors from the operation of the Act. Every debtor who has changed his residence and his place of

carrying on business so often during the six months, as not to have resided or carried on business in any one district for more than three months thereof, would be wholly excluded from the operation of the Act. It is not to be presumed that such an effect was intended. The object of the provision is to bring within the operation of the Act every debtor who has resided or carried on business in any district for any length of time, provided the proceedings are instituted in the district in which his residence or carrying on of business has continued so long as to cover the longest space of time that he has resided or carried on business in any district during the six months next immediately preceding the time of filing the petition. The idea manifestly is, to select as the forum the district where, by reason of the longest residence or the longest duration of carrying on business, the debtor is likely to be best known, or to have had the largest number of business transactions, with the proviso, that such residence or carrying on of business need not have continued for a longer period than for the six months next immediately preceding the time of filing the petition. Thus, during or within such six months, the debtor may have resided or carried on business in one district for two months, in another for one month and three quarters, in another for one month and one quarter, and in another for one month. In such case, the proper district in which to file the petition is the one in which the debtor has resided or carried on business for the two months. So, if, as in this case, business has been carried on in one district for two months during such six months, by the debtors, as copartners, and has not been carried on by them as copartners, in any other district, for any other portion of such six months, such district is the proper district in which to file the petition.

The fact, that the three copartners carried on business as such, in Massachusetts, for the same period,

during the six months, that they carried it on in New York, does not deprive this Court of jurisdiction, it not appearing that they carried on business in Massachusetts for a longer period during the six months than they carried it on in New York. Two months is the longest period during or within the six months, that the three copartners carried on business as such in any district, and they so carried it on for that length of time in this district. Their carrying on of business in this district, as copartners, having continued so long, during the six months, as to cover the longest space of time that they carried on business as copartners in any district during that period, this Court has jurisdiction, notwithstanding they carried on business, as copartners, in Massachusetts, for the same time, during the same period.

The jurisdiction of this Court is sustained, and Day and Pratt must answer to the merits of the petition.

J. M. Ball, for the petitioner.

D. S. Riddle, for Day.

S. E. D. Currier, for Pratt.

Eastern District of New York,

SEPTEMBER, 1869.

THE BARK ALASKA.

PILOTAGE.—JURISDICTION.—TENDER.

Where a pilot boarded a ship, some thirty miles from Barnegat, and the master of the ship proposed that his employment should not commence till the vessel reached pilot ground, whereupon the pilot went to bed, and was called when

Sandy Hook hove in sight, and then took charge of the vessel, and thereafter libelled her for the amount of off-shore pilotage, awarded by the laws of the State of New York:

Held, That the Court had jurisdiction of the action;

That the libellant could only recover for in-shore pilotage, and that, as the amount of in-shore pilotage had been tendered before suit, the decree must be without costs.

THIS was an action to enforce an alleged lien upon the American bark called the "Alaska," for pilotage. The libellant, who was a New Jersey pilot, boarded the bark when some thirty miles south southeast from Barnegat, bound to New York. He did not, however, take charge until Sandy Hook light was just in sight, from which place he acted as pilot until the vessel was moored in the port of New York, which was her home port. For this service he presented a bill for off-shore pilotage. The owners of the vessel refused to pay off-shore pilotage, but, before suit, tendered the regular in-shore pilotage, which was refused, whereupon this action was brought.

For libellant, *Emerson, Goodrich & Wheeler.*

For claimant, *F. A. Wilcox.*

BENEDICT, J. The objection which has been taken to the jurisdiction of the Court is not maintainable. A court of admiralty has undoubted jurisdiction to entertain a proceeding *in rem* against a ship, whether owned in this State or elsewhere, to enforce payment for services actually rendered to such ship in piloting her from sea. If such a service be not maritime, I can conceive of none. (*The Rob. J. Mercer*, *Sprague*, 284; *Hobart* v. *Donegan*, 10 *Pet.* 120.)

Nor can the existence of State pilot laws, regulating pilotage service in and out of the port of New York, have any effect to change the nature of the service.

The States cannot, by legislating in regard to services clearly maritime, make them other than what they are. Statutes of the States regulating the appointment and compensation of pilots, have been held to be valid laws for such purposes, which can be enforced in the tribunals of the States, and are to be looked to as determining the amount of the compensation to be allowed pilots who hold offices under them, whenever the claim to such compensation may be advanced; but they can have no effect to limit the jurisdiction over all causes of admiralty and maritime jurisdiction, which, under the Constitution, has been conferred upon the District Court of the United States. (*Hobart* v. *Deogan*, 10 *Pet.*. 120.)

The libellant is, therefore, entitled to maintain his action, founded as it is upon a maritime contract. But upon the facts, as they appear, he is not entitled to recover the full amount which he has claimed. The evidence shows that the pilot, when he went on board the vessel, assented to the proposition of the master, that his employment should not commence until the vessel reached pilot ground. He accordingly went to bed, was waked when Sandy Hook light hove in sight, and then first took charge as pilot.

Under such a state of facts, he must be deemed to have first offered his services as pilot when the vessel reached pilot ground, and to have waived any right which he might have had, if he had held the master to accept or refuse his services when the ship was first hailed.

The decree will, accordingly, be for the amount of the in-shore pilotage, and as the tender of that amount before suit brought is admitted, the decree must be without costs.

SEPTEMBER, 1869.

THE BARK WALKYRIEN.

Supplies.—Lien.

Where supplies were furnished, in the port of New York, to a vessel which hailed from a British port, carried the British flag, and was intending to proceed to a foreign port to be sold as a British vessel, the supplies being furnished on the order of the owner, but on the credit of the vessel, and being charged to her:

Held, That her owner could not be permitted to claim that she was a domestic vessel, even though it had been proved that her owner resided in New York;

That the vessel was liable for the supplies.

Benedict, J. This is an action to enforce an alleged lien against the bark "Walkyrien," for the amount of certain repairs and supplies furnished that vessel, in the port of New York, in the year 1865.

The vessel, as it appears, was then in the port of New York, and bound on a voyage to sea. Her rigging requiring to be overhauled, to enable her to sail, the libellant was employed by J. C. Jewett, the owner, to do the necessary work. The work was done upon the credit of the vessel, was charged to the vessel, and the amount is not disputed. Afterwards the vessel left the port, and did not return until shortly before the commencement of this action, when she was promptly proceeded against, to enforce the lien for the amount of the bill.

The only question at issue between the parties is, as to whether, by the maritime law, any lien was created upon this vessel.

It appears in evidence, that the vessel in question, at the time the work was done, hailed from a British port,

carried the British colors, and was intending to proceed to a foreign port, there to be sold as a British vessel. Claiming thus the advantages which might be supposed to follow a British vessel, it is not permitted to her owner to assert, in this action, that she was a domestic vessel, or that she was in her home port, when the supplies were furnished, even had it been proved, as it has not, that her owner resided in New York. (2 *M. L. C., p.* 225, 1865.)

The case comes clearly within the previous cases of the James Guy, decided by this Court, and affirmed by the Circuit Court, and within the late decision of the Supreme Court of the United States in the case of the Belfast, (7 *Wal.*, 643,) where it is declared that material men who furnish supplies to a vessel in a foreign port, or in a port other than her "home port," have a maritime lien, because such supplies are presumed to be furnished upon the credit of the vessel. Such a presumption must be held to arise in a case like this, where the supplies were furnished to a vessel hailing from a British port, carrying the British flag, and bound for a foreign port, for the purpose of sale there as a British vessel.

The decree must, accordingly, be for the libellant, with a reference to ascertain the amount.

For libellants, *Emerson, Goodrich & Wheeler.*

For claimant, *Beebe, Donohue & Cooke.*

SEPTEMBER, 1869.

THE SLOOP GEORGE LAW.

Collision.—Dangerous Manœuvre.

Where a propeller attempted to pass close by a sloop, and just as she was passing, a puff of wind caught the sloop's sail, and her boom swung out, and the propeller struck it, receiving damage:

Held, That the propeller, having attempted a dangerous and uncalled-for manœuvre, must bear the consequences of it.

This was a libel by Daniel Shea, owner of the propeller U. S. Grant, to recover damages for a collision. The propeller was coming down the East river, and saw ahead of her the sloop George Law and another propeller, so close together that there was not room to pass between the propeller and the boom of the sloop, as it was swung out. As she approached, however, the sloop's boom was hauled in, whereupon she undertook to pass between them, and, while passing, the boom swung out, and injured her.

For libellant, *D. McMahon.*

For claimant, *Thomas Hooker.*

Benedict, J. This case comes within the rule of the maritime law which imposes the risk of a dangerous and uncalled-for manœuvre upon the party who undertakes it.

The proofs show that the propeller attempted to pass the sloop ahead, at a distance within the length of the sloop's boom, and was struck by the boom in passing.

There was nothing to require the propeller to pass at

the time, or in such close proximity as she did, but, assuming the ability of the men upon the sloop to keep the boom in-board, she took the risk. As it happened, a puff of wind caught the sheet out of the hands of the men on the sloop, and the boom swung out, and into the propeller.

Such an occurrence should have been seen to be possible by those in charge of the propeller, and accident from it avoided by passing the sloop at a greater distance, as might easily have been done.

The libel is, accordingly, dismissed, with costs.

SEPTEMBER, 1869.

THE BARK VIVID.

PRACTICE.—BONDING.—FREIGHT.

Where several libels had been filed against a vessel, to recover amounts exceeding her value, and the owners applied to have her discharged, on their giving one stipulation in the amount of her value:

Held, That the amount of the freight was not to be included in the stipulation.

THIS was an application on the part of the claimants of the vessel, against which several libels had been filed, to recover amounts in all exceeding her value, to have the vessel discharged from all the claims, on their giving one stipulation in her value.

The libellants claimed that the amount of the stipulation to be given should be equal to the value of the vessel and the freight.

For libellant, *Wm. D. Booth.*

For claimant, *Ruggles & Felt.*

BENEDICT, J. The libellants are not entitled to have the freight included in the stipulation, there being no proceeding against the freight. The claimants may have an order directing publication of notice, as heretofore required in the case of the *City of Norwich*, (1 *Ben. U. S. Dist. Rep.*, 89,) and the hearing on the petition must await the return of the order of publication.

SEPTEMBER, 1869.

THE STEAMSHIP CIRCASSIAN.

BOTTOMRY.—ARREST OF SHIP.—TELEGRAPH.

Where a steamship, arriving in Antwerp from New York, was consigned to S., who took the agency of the vessel, put her up for passengers and freight, and paid bills for her, and the vessel was attached for a private debt due from her owner, and it became necessary to relieve the vessel from that attachment, in order that she might sail as advertised, and thereupon the master of the steamer executed a bottomry bond to S. for the amount of the claim of the attaching creditor, and also of the advances made by S. for the steamer:

Held, That inasmuch as the advances had been made without any agreement, or any reasonable expectation, that they were to be secured by bottomry, the bond was invalid as to that item;

That, although the design of the bond to release the ship from arrest, might be a ground sufficient to sustain the bond, yet, as it appeared that the master took no means whatever of communicating with the owner, although he could have done so by telegraph, (the arrival of the ship at Antwerp having been so announced to the owner,) he had no authority to bottomry the ship, and that S. was chargeable with notice of his want of authority, and the bond was invalid.

THIS was a libel by Daniel Steineman and Hermann Ludwig, composing the firm of Daniel Steineman & Co., of Antwerp, against the steamship Circassian, to enforce payment of a bottomry bond for the sum of 61,133 francs, given by the master to the libellants in the port of Antwerp. The material facts were as follows:

The Steamship Circassian.

The Circassian was an ocean steamer, owned by one William Salem, a resident of New York, and was by him dispatched to Antwerp, as the first vessel of a line of steamers which it was proposed to establish between the ports of Antwerp and New York. The intention was to have such line conducted by a corporation, and such a corporation, called the Continental Mail Steamship Company, had been organized, and its officers designated; but its capital was not yet paid in, and it had neither the title nor the possession of the Circassian, or any other steamer. The Circassian, accordingly, went out under the command of a master appointed by Salem, her owner. Herman Troost was on board, in the capacity of secretary of the Continental Mail Steamship Company, and was also authorized by the owner to make the necessary arrangements, on the part of the ship, for the opening of the line in Antwerp.

Upon the arrival of the steamer in Antwerp, the libellants were duly appointed agents of the proposed line, and the vessel was placed in their hands, as agents and consignees. They collected the inward freight, made arrangements with the Government for the carriage of the mails, advertised the vessel to sail with the mails and passengers on a day certain, and procured for the vessel, furniture, bedding, provisions, &c., necessary and proper for a passenger steamer on the intended route. Passengers were also engaged, who paid their passage-money in advance. Freight also was shipped, on part of which the freight was paid in advance.

After the vessel had fairly entered upon the adventure, and passengers had been engaged, the vessel was seized under an attachment issued to collect a personal debt of Salem, the owner; he being then insolvent, and his paper under protest in Antwerp. Efforts were at once made in Court to procure the discharge of the attachment, but without success. Efforts to procure money sufficient to discharge the debt, for which the

attachment was issued, were also made, and the master and Troost went to London for that purpose, but failed.

An additional embarrassment arose out of the fact that the breaking out of the cholera had interfered with the engaging of passengers, so that, as the day of sailing approached, it appeared that the total amount of freight and passage-money collected was insufficient to pay the advances actually made by the agents towards fitting out the vessel for the voyage.

When the sailing day arrived, the alternative was thus presented to the master of procuring, at once, the amount of the attaching creditor's claim, or of announcing that the departure of the steamer must be postponed until the termination of the legal proceedings by a judicial sale of the owner's interest in the vessel, which, with a vessel situated like this, was equivalent to a breaking up of the voyage, an abandonment of the line, and a termination of the prospect of a regular employment for the steamer on the proposed route. The result of such a breaking up of the voyage, or even of any extended delay in the departure of the steamer, would have been to encumber the vessel with maritime liens to the passengers and freighters, for damages and freight pre-paid, which would, in all probability, have far exceeded in amount the debt for which the vessel was attached.

In this emergency it was agreed between the master and Steineman & Co., the libellants, that they should procure the release of the vessel from the attachment, by guaranteeing the payment of the demand, and should be secured therefor, and also for the amount of their previous advances, by a bottomry bond upon the vessel. The release of the vessel was accordingly effected as thus proposed; the master executed to Steineman & Co. the bottomry bond in suit, and the steamer sailed on her appointed day, with the cargo and passengers

which had been engaged. The voyage was performed in safety. Upon the arrival of the vessel in New York, she was taken possession of by Ernest Fiedler, who held a large mortgage upon her, which he proceeded to foreclose, and who, when she was proceeded against in this action, appeared as claimant, and disputed the validity of the bond.

Messrs. Bowdoin, Larocque & Barlow, and *W. W. Mac Farland*, as counsel for the libellants, presented the following points:

1. The bond was absolutely necessary to protect the interest of the respondent, who was a mortgagee, inasmuch as the ship was liable for the engagements for freight and passage entered into by the captain, in the regular course of business, and within the scope of his authority as master. As to this liability the following authorities are quite conclusive: *The Phœbe, Ware*, 265; *The William and Emmeline*, 1 *Blatchf. & How.*, 70, 71; *Sch. Freeman* v. *Buckingham*, 18 *How.*, 182; *Thomas* v. *Osborn*, 19 *How.*, 22; *The Julia Smith*, 1 *Newberry's Ad.*, 61; 6 *McLean*, 484.

2. The general principle that the master cannot give a valid bottomry bond to a creditor, to secure an antecedent debt, where that is the primary object of the bond, and, without the existence of other circumstances making it necessary, is not denied, but fully conceded. The principle is sustained by numerous authorities. (*Greeley* v. *Smith*, 3 *W. & M.*, 253.) The same general rule was laid down in *Hurry* v. *The Ship John and Alice, and others*, 1 *Wash.*, 295, where it is accurately said, that the money must be advanced "for a purpose necessary to enable the master to complete the voyages he was about to perform at the time the necessity existed for making the contract."

3. It is obvious that this rule can have no application to a case where the primary object is not to secure an

antecedent debt, and where the contract is not with the creditor, but where, on the contrary, the advance is absolutely essential to enable the master to "complete the voyage he was about to perform when the necessity arose," and likewise essential to enable the ship to fulfill her engagements, and escape condemnation for a failure to do so; and where the advantage to the creditor is incidental, but unavoidable. While necessity may be said to be the mother of bottomry bonds, yet the necessity itself may spring from innumerable causes. The law only requires that its existence should be shown, in order to pronounce the bond valid. The origin of that necessity is a comparatively unimportant consideration.

"The advantage of allowing the master to take up money on bottomry consists in its enabling him to procure assistance when no other resource is at hand, and the adventure would be frustrated if no other resource was afforded." (*Smith's Merc. Law, p.* 418.) "Necessity, to use the expression of Lord Stowell, is the vital principle of hypothecation, and the Court of Admiralty will consider every circumstance; will go into the whole history of the voyage, in order to determine whether there be that necessity without which an instrument of hypothecation is void." (*Smith's Merc. Law, p.* 419.) Necessity creates the law, it supercedes rules, and whatever is reasonable and just in such cases is likewise legal." (*Sir Wm. Scott in the Case of The Gratitudine*, 3 *Rob. Ad.*, 240, 266; see also *The Nelson*, 1 *Hagg.*, 169; *The Radamanthe*, 1 *Dods.*, 201; *The Gauntlet*, 3 *W. Rob.*, 82.) "That is a sufficient necessity which would induce an owner to do it on the spot." (*The Fortitude*, 3 *Sum.*, 228, 246.) "The master may hypothecate the vessel in a foreign country, to enable him to return home, though the original voyage was broken up by capture, and the compulsory sale of the cargo." (*Crawford* v. *The William Penn*, 3 *Wash. C. C.*, 484.) "In all these cases much

must be left to the master's discretion, and he must exercise it conscientiously, for the general interest. If he acts *bona fide*, and with reasonable care, the rights of the parties are bound up by his acts, although it should afterwards be found that he had committed an error of judgment, and might have acted more beneficially in another manner." (*Judge Story in The Ship Packet*, 3 *Mason*, 255.) Bottomry bonds are the creatures of necessity and distress, and may be expected, therefore, to assume different shapes, which cannot be limited except by the condition of a faithful and beneficial discharge of the authority exercised in granting them, as being necessary for the preservation of the property. (*The Vibillia*, 1 *W. Rob.*, 7.)

4. We come now to consider, in the light of the foregoing authorities, the precise question, whether, in any case, a bottomry bond may be given to obtain the money necessary to liberate a ship from arrest, where the cause of arrest is a claim constituting *per se* no lien on the ship, and to secure which a valid bottomry bond could not be voluntarily given. In examining this question, it will appear: 1. That in no case, English or American, is it decided that a valid bottomry bond cannot be given to relieve a ship from such arrest. 2. That all the American cases, in which the question has arisen, it has been held that a valid bottomry bond may be given, if necessary to relieve the ship from such arrest. 3. That a stronger case of necessity would not be likely ever to arise than the one which gave birth to this bond.

The attention of the Court is invited first to the American doctrine on this subject.

Mr. Parsons says: "Nor can a master make this bond merely to secure former debts of the owner, but might, perhaps, if it were the only way to liberate the ship from arrest and sale for those debts." (1 *Parsons' Maritime Law*, 417.)

And again, at page 423: "So we hold, generally, that

if the liberation of the ship from arrest for debt is a good cause for bottomry, yet, if the attaching creditor is himself the obligee, the bond is invalid."

Judge Story was clearly of the opinion that the master might raise money on bottomry to redeem a ship from *actual arrest*, while "a mere threat to arrest the ship for pre-existing debt would not be sufficient, nor could a valid bond be executed to the creditor himself."

This opinion must be taken as the opinion of the whole court, inasmuch as there was no dissent from the judgment, or the reasoning on which it was founded. (*The Aurora*, 1 *Wheat.* 105.)

A bottomry bond is good if *bona fide* made in a foreign port to relieve a ship under arrest at the suit of a foreign creditor, but it is doubtful if the creditor himself could acquire a valid title thereby. (*Abbott on Shipping*, p. 157, note.)

In the case of the Boston, (1 *Blatchf. & How.* 309,) decided by Judge Betts in 1832, the precise question was involved, and was decided. Certain creditors of the ship for debts incurred on a previous voyage threatened to arrest her, whereupon another person bought the debts, and to secure them, took a bottomry bond. In the course of a very elaborate opinion, the Judge says: "The pre-eminent security of bottomry, with its high privileges, is sanctioned only when a ship *is under positive arrest*, and cannot take effect when the money is advanced only to avert a menaced arrest."

It is plain, therefore, that according to the received American doctrine, this bottomry bond was authorized by the necessities of the ship, and is valid.

The English rule is thus stated in Maclachlan on Shipping:

"The want which exacts the loan must be such as, if not supplied, would *prevent the prosperous completion of the voyage*, not extending to the master's own debts, or the discharge of his person from prison, or even the

liberation of the ship herself from arrest *without other circumstances combined.*"

In *Smith* v. *Gould*, 4 *Moore P. C.* 21, Lord Campbell expressed the opinion that a master might hypothecate his vessel in any case, where it might be arrested and sold for a demand for which the owner would be liable.

In an earlier case, *The Augusta*, 1 *Dod.* 283, Sir William Scott uses this language: "It has been said that the party *might*, by the law of Russia, have detained this ship till the money was repaid, but I do not think *that circumstance alone* will be sufficient to convert this into a case of hypothecation."

In the *Lochiel*, 2 *W. Rob.* 44, Dr. Lushington says: "Lord Stowell, when he decided the case of the Augusta, entertained great doubt, in the first instance, whether a vessel could be legally hypothecated merely to avoid her detention, but upon subsequent consideration, he was inclined to hold that it might be an additional reason for hypothecation, and that opinion I also adopted in a case that came under my own consideration, that of The Vibillia." This case was decided in 1843.

In 1849, The Osmanli was decided, a case that will doubtless be mainly relied upon by the respondent, but which is in nowise hostile to the claim of the libellant in the case at bar, as to the point actually involved and decided. Mongredieu owned the larger share in, and had the management of the ship. Messrs. Duckworth & Co. were the agents of the ship at Malta. On the occasion in question she put into Malta, and applied to the agents for coal, who, instead of supplying it, arrested the ship for a balance of Mongredieu's account current. Leonard, the managing partner of Duckworth & Co., persuaded the master to give a bottomry bond, and undertook to find a person to advance the money. He did so. Messina nominally advanced the money, and the bond was given to him. There were no peculiar circumstances in

the case. After laying much stress on the fact that the bond was, in substance, a bond to the ship's agents to secure an antecedent debt, the court declared it invalid. (3 *W. Rob.*)

From these authorities, then, it would seem to be a fair and accurate statement of the present English rule on this subject, to say that, independent of other circumstances rendering it necessary and proper, a valid bottomry bond cannot be given, directly or indirectly, as security for an antecedent debt.

But a valid bottomry bond may be given to relieve a ship from arrest, where that is the primary object, and the security of the debt an incident, or, as it were, an accidental circumstance, the circumstances of the ship being such as to render it prudent and judicious to obtain her discharge in this mode.

And it will, therefore, upon careful examination, appear that there is really no or very little conflict between the English and American courts, the latter being, if anything (as they always are in admiralty cases) rather more liberal and catholic than the former.

And it may be safely asserted that under this rule, the bond in question would be sustained owing to the overpowering necessity that gave birth to it. This class of bottomry bonds bears a very strong analogy to a ransom bill. The creditor in the former derives a benefit from the necessity which he has imposed upon the ship, as does the captor in the latter; but the obligation is given, not that this benefit may be received, but that the ship may go free.

5. It is to be inferred from the answer that it is to be contended that it was the duty of the master to communicate with his owners, but inasmuch as his owners were in New York, and he was in Antwerp, it is submitted that this point is quite destitute of plausibility. (*Parsons' Maritime Law*, Vol. 1, p. 414 *et seq.*)

Messrs. Barney, Butler, & Parsons, and *T. E. Stillman*, on behalf of the claimant, argued as follows:

1. The bottomry bond, so far as it embraces the sum of 16,575 frs., the general balance of account between the steamship Circassian, and the libellants, her consignees, is invalid for the following reasons:

Advances having been made, even though by a stranger, it is too late to secure them by a subsequent bottomry, unless that security was in contemplation at the time the advances were made, or unless the advances were made upon the exclusive credit of the ship; and in respect to consignees, no presumption arises, that in making advances they do so either relying upon the credit of the ship, or in contemplation of the security of a bottomry bond.

On the contrary, the true rule is, that in order to enable a consignee to secure himself by a bottomry, if, indeed, he can do so in any case, he must give notice of his intention to do so, before making the advances. (3 *Kent's Com.* 460; *The Augusta*, 1 *Dod.* 283; *The Jane*, 1 *Dod.* 461; *The Hunter, Ware*, 251; *The Hero*, 2 *Dod.* 143; *The Lord Cochrane*, 2 *W. Rob.* 320; *The John and Alice*, 1 *W. C. C.* 293; *Hurry* v. *Hurry*, 2 *W. C. C.* 148; *The Emperor, Bee's R.* 339; *Hendrickson* v. *Pryor*, 1 *Brock.* 396, and cases cited; *The Yuba*, 4 *Blatchford's C. C. R.* 352; *The Panama, Olcott* 343.)

Here the advances were made by Steineman & Ludwig, relying upon the funds which they had, and would receive as consignees, and before a bottomry bond *for them* was in contemplation.

2. The lender on bottomry must exhibit an account of the items advanced, with sufficient proofs to support them, to enable the Court to judge of their necessity, and in order that they may be separately weighed and considered. (*The Aurora*, 1 *Wheaton*, 96; *The Bridgewater, Olcott's R.*, 35, and cases cited.) The only account

exhibited, in the case at bar, is the general one, amounting to frs. 52,886. It shows, in a great measure, only the kind of supplies and materials furnished, and not the things, nor their amount. "Ship chandlery," to the amount of frs. 7,873$\frac{44}{100}$, and "cash to captain, frs. 12,300," are general terms. The Court can form from them no opinion as to the necessity of such expenditure. It is incumbent upon the creditor who claims an hypothecation, to prove both the actual existence of the necessity of those things which give rise to his demand, and that the funds requisite to obtain those things could be procured in no other way than by the execution of a bottomry bond. (*The Aurora*, 1 *W.*, 96.) (*a*) As to the necessity of the items, it must be shown that the expenditure was for the safety or security of the ship, or for repairs or necessaries which were reasonably fit and proper for the completion of the voyage, and such as a prudent owner would have ordered, under all the circumstances, had he been present. (*Prince of Saxe Coburg Gotha*, 3 *Hagg.*, 392; 3 *Moore's P. C. C.*; *The Reliance*, 3 *Hagg.*, 74; *Hendrickson* v. *Prior*, 1 *Brock.*, 396, and cases cited; *The Orelia*, 3 *Hagg.*, 75; *Rucher* v. *Conynham*, 2 *Peters' Ad. R.*, 295; *The Hersey*, 3 *Hagg.*, 404; *Hurry* v. *Hurry*, 2 *W. C. C.* 148; *The John & Alice*, 1 *W. C. C.*, 293; *The Augusta*, 1 *Dod.*, 287; *The Medora*, 1 *Sprague*, 138, and cases cited; *The Osmanli*, 3 *W. Rob.*; *The Lord Cochrane*, 2 *W. Rob.*, 320; *The Aurora*, 1 *Wheaton*, 96; *The Virgin*, 8 *Peters*; *The Fortitude*, 3 *Sumner*; 3 *Wash. C. C.*, 484; *Wainwright* v. *Crawford*, 4 *Dall.*, 225; *Meroni* v. *Shailes*, 12 *Conn.*, 489; 3 *Kent's Com.*, and cases cited; 1 *Parsons' Mar. Law*, p. 422, and cases cited; *Burke* v. *Brig M. P. Rich*, *Clifford's R.*, 314, and cases cited.) (*b*) Libellants having failed to exhibit an account of the items covered by their general balance of account, must show the actual existence of the necessity of their entire expenditure, in order to sustain the bottomry given to sustain a general balance. This they fail to do. (*c*) Nor

can the bottomry bond be sustained on the plea that the consignees might have arrested the ship for their advances by the general maritime law. They must meet the same question of necessity as to the items furnished, in order to sustain their claim to a maritime lien, that they have to meet in order to sustain a bottomry bond, (*Pratt* v. *Reed*, 21 *How. R.*,) and a mere liability to arrest will not sustain a bottomry bond, (*The Osmanli*, 3 *W. Rob.*, p. 198; *The Prince George*, 4 *M. P. C. C.*, 21; *The Augusta*, *supra*; *The Royal Arch*, *Swabey*, 279,) nor will a mere threat to arrest the ship, though it be for a debt of the ship. (*The Aurora*, *supra*; *The Boston*, 1 *Blatchf. & How.*, 309, and cases cited.) (*d*) Advances to the officers and crew are not such necessaries as will justify the giving of a bottomry bond. (*The Cognac*, 2 *Hagg.*, 385; *The Magoun*, *Olcott*, 65.) In the former case, advances paid before the termination of the voyage, and included in a bottomry bond, were disallowed, on the ground that it was a premature payment, and might never become due, and, if paid in this form, might fall upon the owners of the cargo. In the case at bar, if such advances were allowed, they would fall upon a prior mortgagee. And, on the general principles of maritime law, the wages of the crew are made to depend upon their fidelity to the ship when she is in distress. (3 *Kent's Comm.*, 274, and cases cited; 2 *Parsons' Mar. Law*, 589, and cases cited; *Abbott on Shipping*, 173, *marginal*.) (*e*) The libellants cannot avail themselves of the words "fit and proper," found in the opinion of Judge Story, in the case of *The Fortitude*, *(supra,)* for these words are qualified by the expression, "such as a prudent owner would have purchased, had he been present." The conduct of the consignees, in the case at bar, was far from prudent. With the ship under attachment for frs. 39,000; forewarned, by the prevalence of cholera, that their expectations of procuring a full complement of passengers would not be realized; professedly aware of the impossibility of rais-

ing funds upon the credit of the owner of the ship, or of the Continental Mail Steamship Company; and fully aware of the existence of Mr. Fiedler's mortgage for $90,000 on the ship, they made no effort to check the reckless expenditure proven in this case, but paid bill after bill, without investigation or inquiry, and, at the last moment, sought to save themselves from loss, by shifting it upon the shoulders of the mortgagee. Such conduct, if it be not willfully fraudulent, is so grossly negligent as to be virtually so.

Libellants have entirely failed to prove any effort to obtain the money necessary to cancel their claim for general balance of account in any other way than by the giving of a bottomry. As to the general balance of account, there is no evidence of the necessity of a resort to bottomry, in order to secure it. It does not follow that, because no one would advance frs. 39,000, without the security of a bottomry bond, that the sum of frs. 17,000 could not be raised without that security; and, indeed, libellants nowhere say or pretend that it could not.

3. The bond in suit is not only clearly invalid, so far as it sought to secure the general balance of account, but it is equally invalid as to the amount raised upon it to release the vessel from arrest for the debt of Salem.

The attachment of the vessel at Antwerp was to enforce the payment of a debt due from William Salem, growing out of bills of exchange drawn on him, and protested for non-payment. By the general maritime law, such debt did not constitute a maritime lien upon the Circassian, nor is there any evidence that it did by the laws in force at Antwerp. The prayer of the request to seize the Circassian invokes a principle of equity, that creditors may be protected by the "order of the Courts of the country where the personal property or real estate of a foreign debtor is situated, even though the creditor be also a foreigner." In every respect, so

far as the papers disclose, the proceedings at Antwerp were precisely identical with our State proceedings by attachment against non-resident debtors, and could no more constitute or give rise to a maritime lien, than could an attachment, issued out of the courts of the State of New York against a non-resident debtor, and levied upon his interest in a foreign ship. Therefore, only the interest of William Salem, over and above the mortgage, could have been attached, or sold, had the proceedings so commenced terminated in a judicial sale.

The vessel was not seized under a law giving a specific lien upon the ship, as contradistinguished from a lien upon the interest of the owner in the ship, and the cases in which the master may hypothecate his ship to procure her discharge from arrest to enforce such lien do not apply. In such cases, good sense and equity support the bottomry; because, (*a*) It has been given in discharge of a debt, by which the ship has been preserved, or its value enhanced—*i. e.*, a debt for repairs, supplies, or to relieve the vessel from distress, enable her to perform her voyage and earn freight—and has imposed no new burden upon the ship. In such a case, the lien has only changed its form from a tacit to an express one, with the addition of maritime interest. (*b*) The liability of a ship, *in specie*, for supplies and repairs furnished in a foreign port, and for advances made to relieve her when in distress from casualties incident to navigation, may be presumed to be known to all interested in her; and the law presumes their assent, when, under such circumstances, her master, unable to communicate with her owners, gives a bottomry for her relief.

In the case at bar, however, the above reasons do not apply. Here, the question is simply, Can a general creditor, finding a ship of his insolvent debtor in a foreign port, by means of an attachment, turn his debt from a simple contract debt into a maritime one, and thus secure the advantage of maritime interest, and the

security of a bottomry? This proposition cannot be maintained. (1.) It would be unjust, and productive of irreparable damage and confusion of rights and remedies, if a creditor could, at his option, enforce and secure his simple contract debt against a debtor happening to have a ship, or an interest in a ship, in a foreign port, by converting it into a maritime lien, by hypothecation, upon the entire ship. If he could do this, then, whether the debt were valid or invalid, honest or dishonest, outlawed or still existing, usurious or otherwise, the sacred obligation of bottomry would exist therefor; and, made payable at the end of a voyage other than to the home port, it would be enforced, without an opportunity to the owner to defend himself against a claim, which, in the place where the contract was made, could never be enforced. "It would seem against the policy of the law," says Judge Story, in the case of the Aurora, "to permit a party in this manner to obtain advantages from his contract, for which he had not originally stipulated. It would hold out temptations to fraud and imposition, and enable creditors to practice gross oppressions, against which even the vigilance and good faith of an intelligent master might not always be a sufficient safeguard in a foreign country." These results would follow, whether the bond were given directly to the creditor, or to a third person. If, in the latter case, the bond could be allowed, the creditor would only need to secure the services of a friend, who should appear upon the scene as a stranger, and, after the plunder was secured, divide the profits with his principal. Rarely, if ever, could the collusion be proved to the Court. (2.) In the case supposed, the rights of part owners must be overridden, and the bottomry, given to release the vessel from arrest for the debt of one part owner, must be enforced against the whole ship. The only remedy of the part owner, whose property has thus been, through the prostitution of legal process, appropriated to pay another man's debt, is a

civil action against a probably insolvent debtor. (3.) If the creditor be rapacious, or the debt exceed the value of the ship, then the cargo must be embraced in the bottomry bond; for, where the master may hypothecate the ship, he may the cargo also. (4.) Not only the foregoing consequences would result from the proposition that a bottomry bond may be given to release a vessel in a foreign port from an arrest for a general debt of her owners, but, as in the case at bar, mortgagees who in good faith have advanced their money to the owner upon the security of the ship, are robbed of their priority, and postponed to subsequent general creditors, who, in their contracts, trusted to the personal credit of the owner, without any security. And, generally, it is not too much to say, that to maintain such a doctrine, would be to overturn well-settled principles of the maritime law, to the great detriment of commerce, and the security of property in ships and vessels.

The bond in the case at bar is not only void upon principle, so far as it includes the moneys given to release the vessel from arrest, but is also void according to the decisions in the following cases: *The Osmanli*, 3 *W. Rob.* 198; *The Aurora*, 1 *Wheat.*, 96.

Even if the bond could be sustained upon principle or authority as to the frs. 39,000, there is no proof of any debt due from Salem to the attaching creditor, or that the proceedings commenced by the attachment ever established any such debt, or indeed ever proceeded to a judicial determination, or that the libellants ever paid or were called upon to pay the debt, or any part of it, or to make good their guaranty to the attaching creditors, or any part of it. They stand only in the relation of sureties to Salem, their principal. They show neither that Salem has been called upon to pay the amount of the debt, nor that they have paid it, in his default, as sureties.

4. The evidence shows clearly that, although means existed, and were available, by which the master and

consignees of the Circassian could have communicated with the owners in New York, and received their advices as to giving a bottomry bond on the ship, long before the appointed day for sailing, and long before the giving of the bond, no such communication was made or attempted. The testimony is positive, that they telegraphed to the owners in New York the arrival of the Circassian at Antwerp, and that by the same means they could have asked instructions as to the proposed bottomry bond. They should have done so. However great the necessity, and notwithstanding the presumption or probability that the owner cannot respond, the authority of the master to execute a bottomry, arising as it does clearly *ex necessitate*, does not exist when he can communicate with the owner. There is no pretence of an attempt to do so in this case, nor any excuse for its omission. The omission to do so is fatal to the validity of the bond in suit. (*La Ysabel*, 1 *Dod.*, 274; *Royal Arch*, *Swabey*, 275; *Wallace* v. *Fielden*, 3 *W. Rob.*, 243; same case, 7 *Moore's P. P. C.*, 398; *The Bonaparte*, 8 *Moore's P. C. C.*, 460; *The Lord Cochrane*, 2 *W. Rob.*, 333; *The Hamburgh.*)

BENEDICT, J. In considering the questions which the facts of the case present, it may be noticed at the outset, that, although the circumstances under which this bond was taken afforded opportunity for collusion between the creditor, who attached the steamer, and the agents, who subsequently took the bond, none is suggested here. Had any circumstances appeared in any way pointing to collusion, it would have been incumbent upon the bond-holders to present a full and satisfactory explanation of them, before the Court could be asked to consider their demand.

Nor is there anything oppressive in the rate of interest, which was inserted in the bond; but it is shown that the ten per cent., which is provided for, is the usual

charge upon commercial advances on merchandise, intended to cover simple interest, with the difference of exchange, commissions, and insurance; so that the demand represented by the bond is simply a sum of money advanced by the libellants, with the ordinary expenses of such an advance. The case thus presents no features of hardship, as against the claimant, but, on the contrary, shows a strong equity in favor of the libellants. There appears, therefore, no reason why the bond in question should not receive that favorable consideration which courts of admiralty are always inclined to give to this class of security. It must also be held subject to those rules which the courts have declared to be applicable to such instruments.

Turning then to the bond, it is found to be composed of two items, differing from each other in their nature. One is that of frs. 16,575, consisting of the general balance of the libellants' account of advances, as agents of the steamer. As to this balance, it has been shown in evidence that the libellants made no suggestion of security for it, until after the advances had been made, and the vessel was ready to depart, when, on presenting the bond to the master for signature, they stated that they had not intended to ask security for the account, but it might as well be inserted, since a bond was to be given. This evidence brings the portion of the bond now under consideration clearly within the rule which declares that advances cannot be secured by bottomry, unless made under an agreement, or at least a reasonable expectation, founded upon surrounding circumstances, that such security would be given. The rule must therefore be applied, and, accordingly, it must be held that, as to this item, the bond is invalid.

The remainder of the principal of the bond represents the amount claimed to have been advanced by the libellants, to procure the discharge of the attachment which had been levied upon the vessel for the per-

sonal debt of the owner, as to which bottomry security was agreed on by the master.

To this item several objections have been taken, a single one of which will be noticed here. It is said that the item—assuming that it represents an actual advance by the libellants—cannot be allowed, for the reason that the maritime law does not authorize the master of a ship in any case, to raise money by bottomry for the purpose of releasing his ship from an attachment levied to collect a personal debt of the owner, for which the ship herself is in no way liable.

To the important question thus raised I have given great consideration, aided by very careful arguments on the part of the advocates, and a reference to all the cases calculated to throw light upon it. There are, undoubtedly, difficulties and dangers in permitting the exercise of such a power by the master of a ship; but there are also strong reasons against the absolute denial of the power, arising out of the nature, employment, and possible necessities of this peculiar class of property; and I greatly doubt whether the rule contended for by the claimants can be laid down as a fixed rule, applicable in all cases.

Bottomry bonds are the creatures of necessity and distress. They are permitted, in order to enable the ship to save herself from disaster, and to continue the employment for which she is constructed; and when, in any case, that object has been attained in a proper manner, by means of a bottomry bond, as a last resort, it is doubtful whether it will do to hold that the instrument is unauthorized.

As Sir William Scott has well said: "Necessity creates the law—it suspends rules—and whatever is reasonable and just, in such cases, is likewise legal." (*The Gratitudine*, 3 *Ch. Rob.* 266.) It would seem neither reasonable nor just to say that a steamer sent out to Europe to be the pioneer vessel in a new line, when at-

tached for a debt of the owner, and the owner's interest liable to be sold by due process of law, must therefore throw herself out of a permanent employment, and abandon her voyage, thereby rendering herself liable *in rem* to demands by way of damages exceeding the amount of the attaching debt, when she possesses in her bottom a sufficient basis of credit upon which the master could raise the smaller sum needed to discharge her from the attachment, and thus avert the disaster.

If, therefore, the validity of this bond depended upon the question whether a sufficient necessity existed to authorize its execution by the master, I should be inclined to hold that the peculiar and embarrassing circumstances which attended the seizure of this steamer—certain as they were, in all human probability, to bring disaster to the vessel, and great loss to all interested in her, if the seizure could not be promptly terminated—were such as to authorize the master to raise by bottomry the amount necessary to discharge the attachment. The primary object of the bond was to avoid the disaster to the steamer, which these attending circumstances would certainly entail, if the attachment continued; and the bond should not lose the characteristic which it derives from its primary object, because an incidental effect of it would be to pay a debt for which the ship herself was not liable.

But the validity of this bond cannot be made to depend upon the determination of this question alone, inasmuch as an additional objection, applicable to the whole bond, has been taken by the claimants, which the libellants have not been able satisfactorily to answer; and that is, that the master omitted to communicate with his owner, before executing the bond. Such a communication, when it can be had, is as important to be shown as the necessity of the ship. In the case of The Oriental, where the point escaped the attention of the Court below, a reversal was granted upon this

point alone. (*7 Moore's P. C.* 398.) The utility of the rule requiring notice to the owner, when practicable, is obvious. It imposes no additional burden upon the ship, and no difficult duty upon the lender, while its observance makes fraud and collusion more difficult, and often dispels doubts which would otherwise arise in cases of this class. It is a rule which should not be relaxed, and in the present case—a case the equities of which I have fully stated, in order that my opinion may indicate the importance which I attach to the rule—it is fully applicable, for it is shown that there was, at the time, telegraphic communication between Antwerp and New York, the home of the owner, and that resort was had to that mode of communication to announce the steamer's arrival in Antwerp. This fact must have been known to the libellants, from their position as agents of the ship, and ordinary prudence on their part would have suggested notice to the owner of the necessity of the ship, and the intention to take a bond. They knew that such notice was practicable, and that it had not been given, and they are chargeable with knowledge that, in the absence of such notice, under the circumstances, the master was without authority to bottomry his ship.

For this reason, therefore, I must declare the bond in question not to be binding upon this steamer, and, accordingly, I dismiss the libel, with costs.

Southern District of New York,

OCTOBER, 1869.

THE STEAMBOAT HENDRICK HUDSON.

JURISDICTION.—SALVAGE.—A FLOATING HOTEL.—COSTS.

A steamboat had been dismantled, and stripped of her boiler, engine, and paddle-wheels, and fitted up as a saloon and hotel, and used as such for some months, and was being towed to another place, to be there used in a similar way, and, while so being towed, got ashore, and it was necessary to lighten her by pumping, and a steam propeller was employed for that purpose, whose owner afterwards filed a libel against the hulk, to recover compensation for such pumping, as a salvage service:

Held, That the hulk was not, at the time, engaged in commerce and navigation, in such a sense as to be liable *in rem*, in admiralty;

Whether it would be liable for a tort or injury committed by it, *quere;*

That the libel must be dismissed, for want of jurisdiction, without costs.

BLATCHFORD, J. The libel, in this case, is propounded as one of salvage, against the steamboat Hendrick Hudson, to recover the sum of $546, for services rendered by the steam propeller John Fuller, owned by the libellants, to the said steamboat, on the 20th of May, 1869, in pumping water out of her, and keeping her afloat, and towing her. The principal defence set up in the answer is, that the thing proceeded against was, at the time the service was rendered, and at the time of its seizure under the process in this suit, a hulk, without motive power, not used in commerce in any manner, but used as a hotel, at Polipel's Island, in the Hudson river, opposite Newburgh, and that this Court has no jurisdiction to proceed *in rem* against such hulk. The hulk had once been a steam-

boat, but was dismantled as such, and stripped of its boilers, and engine, and paddle-wheels, and purchased by the claimant. In that condition, it was taken from the city of New York to Saugerties, on the Hudson river, and there fitted up as a saloon and hotel. It remained at Saugerties during the winter of 1868, and until May, 1869, ashore, with the tide rising and falling in it. In May, 1869, the leaks in it were stopped sufficiently to enable it to be floated, and it was towed from Saugerties to Polipel's Island by a tug-boat. While the tug-boat was endeavoring to put the hulk in the position in which its owner desired to have it, and before it reached such position, it struck the bottom, near the island, and became immovable. To move it farther, required that more floating power should be given to it, by overcoming, by pumping, the leaks through which the water entered it. For this purpose, the libellants were applied to, and their propeller, by pumping water out of the hulk faster than it came in, gave the hulk more floating power, and then, by pushing or pulling it, or both, moved it to a point designated by its owner, where it was suffered again to sink, and rest on the mud at the bottom, near the island. For this service to the hulk, the suit is brought.

Although this hulk or structure had been once a vessel, in the full sense of the term, and subject to the admiralty and maritime jurisdiction of the proper courts of the United States, and although its form and shape under water continued to be those of a vessel, yet I think that, in the actual circumstances of its physical existence, this Court was and is without jurisdiction over it, *in rem*, in respect of the claim sued on in this suit. This hulk was not, in any proper sense, engaged in commerce or navigation. A floating house of religious worship, or a floating swimming bath, or a floating residence, could be towed, and, in such a sense, navigated, but such a structure would not be engaged in navigation, in such a

sense as to be liable *in rem*, in the admiralty, for a service like the present one. The fact that the structure has the shape of a vessel, or had been once used as a vessel, or could, by proper appliances, be again used as such, cannot affect the question. The test is, the actual status of the structure, as being fairly engaged in commerce or navigation. A contract, claim, or service, to be cognizable in the admiralty, must be maritime, in such a sense that it concerns rights or duties appertaining to commerce or navigation. (1 *Conkling's Admiralty*, 8; *The Belfast*, 7 *Wallace*, 624, 637.) Though the service in the present case was maritime in one sense, because the hulk was in the water, yet it was not maritime in such a sense as to bring the case within the admiralty and maritime jurisdiction of this Court, under the grant of judicial power conferred on it by the 9th section of the Act of September 24th, 1789, (1 *U. S. Stat. at Large*, 76, 77,) under the authority of the 2d section of the 3d article of the Constitution. The service did not fairly and legitimately concern any right or duty which appertained to commerce or navigation, or to a structure engaged in commerce or navigation. Whether the structure in question would or would not be liable *in rem*, in the admiralty, for a tort or injury committed by it on navigable waters, depends on different considerations, and is not necessarily determined by holding it not to be liable in this suit.

The libel must be dismissed for want of jurisdiction, but without costs to the claimants. (*The McDonald*, 4 *Blatchf. C. C. R.*, 477.)

Barney, Butler & Parsons, for libellants.

Beebe, Donohue & Cooke, for claimant.

OCTOBER, 1869.

IN THE MATTER OF SAMUEL LOWENSTEIN AND ROSA LOWENSTEIN.

Costs in Involuntary Bankruptcy Proceedings.—Marshal's Fees.—Set-off.

Where a petition in involuntary bankruptcy is dismissed, with costs as against the petitioner, the petitioner's debt against the bankrupt will not be allowed to be set off against the costs.

In order to the taxation of charges by the marshal for the keeping of property in such proceedings, under the 47th section of the bankruptcy Act, it must be shown that such expenses are just and reasonable, and have been actually incurred and paid by the marshal.

Blatchford, J. This is an appeal, by the petitioning creditor, from the taxation of costs by the register, on the dismissal of the petition, in a proceeding in involuntary bankruptcy. The items allowed, and complained of by the creditor, were all of them properly allowed, except the item of $1,007.50, for 403 days, at $2.50 per day, allowed to the late marshal, as expenses of keeping property, from November 11th, 1867, to December 17th, 1868. The item is charged by the late marshal, as expenses. But his affidavit in regard thereto is defective, inasmuch as it only states that such expenses were necessarily incurred by him, and are just and reasonable. It ought to state that they have been actually incurred and paid by him, and are just and reasonable. The 47th section of the bankruptcy Act allows to the marshal, for custody of property, "his actual and necessary expenses, upon returning the same in specific items, and making oath that they have been actually incurred and paid by him, and are just and reasonable, the same to be taxed or adjusted by the Court, and the oath of the messenger

shall not be conclusive as to the necessity of such expenses." By the fee bill of February 26th, 1853, (10 *U. S. Stat. at Large*, 164,) the marshal is allowed the necessary expenses of keeping property attached or libelled in admiralty, not exceeding two dollars and fifty cents per day. The word "expenses" implies an expenditure or payment, and nothing can be allowed as expenses, under section 47, which is not shown affirmatively to have been necessary, and just and reasonable in amount, and to have been actually paid. The rule in admiralty is, that, to authorize an allowance for a keeper, it must be shown that he was necessarily employed, from a prudent precaution in regard to the interests of all concerned in the property; that he actually continued in charge of the property for the time charged; and that the sum charged was not only paid, but was reasonable for the service. (*The Trial*, 1 *Blatchf. & How.*, 94, 113.) The same rule has been applied to the case of a seizure by the marshal of property proceeded against by the United States, by information, as forfeited under the internal revenue laws. (300 *Barrels of Alcohol*, 1 *Benedict*, 72.) The proofs taken in the present case, on the taxation before the register, are not sufficiently full as to the necessity for the employment of the keeper charged for, or as to his actual daily continuance in custody of the property. As to his payment, they not only do not show that he was paid the amount charged, but they show that he was paid but a small part of it. The rule laid down in the case last cited is the proper one, and must be followed. It is this: "The sum actually paid a keeper to watch property in custody, not exceeding $2.50 a day, may be taxed by the clerk, upon satisfactory proof that a prudent precaution in regard to all concerned in the property justified the marshal in placing a keeper over it; that the keeper actually continued in charge of it for the time specified; and that the sum charged therefor is

reasonable for the service, and has been actually paid by the marshal."

The case is referred back to the register, as to this item of keeper's fees, to take further proofs, if offered, and tax the item on the principles above laid down.

The motion made by the petitioning creditor, to offset his claim against the debtor against the costs, when taxed, is denied.

G. A. Seixas, for the creditor.

J. H. V. Arnold, for the debtors.

OCTOBER, 1869.

THE STEAM FERRY-BOAT AMERICA.

COLLISION IN EAST RIVER.—VESSELS CROSSING.—PORTING HELM.—WHISTLES.

A steam vessel has no right to select for herself a particular course, and, by the use of her whistle, prescribe to another steam vessel a particular course, without regard to the Act for preventing collisions.

Article 18 of that Act only applies when each vessel, by day, sees the masts or the line of the keel of the other in a line, or nearly in a line, with her own masts or the line of her own keel, and when, by night, each vessel is in such a position as to see both of the side-lights of the other.

The steamboat F. was going down the East river, with the ebb tide, and the ferry-boat A. was crossing from New York to Brooklyn, and heading up against the tide, so as to swing into her slip, in such a position that, if both vessels had kept on, the F. would have passed ahead of the A., and between her and the Brooklyn shore. The F. blew one whistle, and ported, whereupon the pilot of the A., seeing that, if both vessels kept on, the A. would be struck on her starboard side, also ported, and the two vessels came together nearly head on:

Held, That the F. was in fault, in porting, and attempting to cross the course of the A., and that the A. was not in fault.

The Steam Ferry-Boat America.

BLATCHFORD, J. This is a libel, filed by the owners of the steamboat Fairfield, against the steam ferry-boat America, to recover for the damages caused to the Fairfield by a collision, which took place between her and the America, on the 13th of December, 1867, at about five o'clock in the afternoon, in the East river, between New York and Brooklyn, a short distance below the Brooklyn slip of the Fulton ferry. The Fairfield was going down the East river, having come from the Navy yard at Brooklyn, and being bound into the North river, around the Battery. The America was a boat running on the Fulton ferry, from the slip at the foot of Fulton street, New York, to the slip at the foot of Fulton street, Brooklyn, and was at the time on a trip from New York to Brooklyn. The tide was strong ebb. The case made by the libel is, that the Fairfield was going down, at about the middle of the river, when the America left her slip on the New York side; that, as the vessels neared each other, a single whistle was blown by the Fairfield, to indicate her intention to go to the right, and the wheel of the Fairfield was put to port, and her head sheered angling towards the New York shore; that the America paid no attention to the whistle of the Fairfield, but continued to haul more up the river, and on to the Fairfield; that, as it was found that the America was rapidly hauling on to the Fairfield, and still continuing to head more and more up the river, and that a collision, if the America kept on, would probably happen, the bells of the Fairfield were rung to slow, stop, and back; that these orders were promptly obeyed, and the headway of the Fairfield was nearly, if not quite, stopped in the water; that, while the Fairfield was in that condition, the America blew two whistles, indicating her intention to go to the left; that, at that time, the America was so close to the Fairfield, that the Fairfield, her engine and way being stopped, could do nothing except continue to back her engine; that the America kept

on, at nearly, if not quite, full speed, and struck the stem of the Fairfield, a little on the larboard side, crushing in her planks and timbers, and opening her forward; and that the Fairfield commenced to take in water rapidly, and was backed into a slip below the Brooklyn terminus of the Fulton ferry, and there sank in a few moments. The libel alleges, that the collision happened through the carelessness, negligence, and want of skill and management of those navigating the America, and, among other things, in not having good and sufficient lookouts, in not promptly answering the single whistle of the Fairfield, in hauling up the river in such a manner as to bring her upon the Fairfield, in not keeping to the right, in blowing two whistles, and attempting to go to the left of the Fairfield, when the Fairfield was lying dead in the water, and when she was so near to the Fairfield that a collision could not be avoided, in passing outside of the Fairfield, and then steering up the river and towards the Fairfield, and in not slowing, stopping, and backing before the collision was inevitable. The libel also avers, that the management and navigation of the Fairfield were correct and proper, as it was her duty to keep to the right, and to indicate her intention by a single whistle, and, when she found that the America disregarded her signals, and continued to sheer on to her, to slow, stop, and back. The answer alleges, that, when the America was within about 200 yards of the Brooklyn shore, and about 250 or 300 yards of her slip on the Brooklyn side of the river, and was heading up the East river, against a strong ebb tide, for the purpose of getting room to swing into said slip, her pilot discovered the Fairfield, under full headway, heading down the river, and towards the Brooklyn shore, on a course which, if continued, would have carried her in front of and past the America, on the side towards the Brooklyn shore; that thereupon the America kept steadily on her course up the river, in order that the Fairfield might

keep her course, and pass in front of the America, as she could easily have done, without any collision; but the Fairfield, after continuing said course until within a short distance of the America, and when the Fairfield was under full headway, and when it was impossible for the boats to so change their course as to pass each other on the right without colliding with each other, blew one whistle, indicating her intention to pass on the right; and outside of the America, and simultaneously put her helm hard to port, and in that way steered directly towards the America; that, as soon as the Fairfield so sheered and blew her whistle, it was obvious that she would strike the America on the starboard side, unless the America could be so sheered as to receive the blow upon her bow, or as to admit of the Fairfield's passing on the opposite side of the America, or of striking her a quartering instead of a full blow on her side; that the only course which the pilot of the America could thereupon properly adopt, to prevent the America from being struck on her starboard side, and being cut through, was to give one whistle as a signal, so that the Fairfield might put her helm as hard a-port as possible, and to put the helm of the America hard a-port at the same time; that all this was immediately done by the pilot of the America, and she was immediately stopped, and her engines were backed, and she had stopped her headway by the land, when the Fairfield, continuing her course directly towards the America, struck her, the two vessels colliding head and head; and that the collision was caused wholly by the carelessness, negligence, and want of skill and management of the persons navigating the Fairfield, and, among other things, in not having a good and sufficient lookout, or a competent pilot, in blowing one whistle, and putting her helm to port, and attempting to pass the America on the right, when she had sufficient room to pass the America on the left, and when her course, if continued, would have taken her past the

America on the left, and when it was plain that an attempt to pass on the right would probably bring about a collision, and in not slowing, stopping and backing before the collision became inevitable, or so as to lessen the force of the same.

In looking into the libel, the first thing that arrests attention is the fact, that it does not state how the two vessels bore from each other, or how they were approaching each other, when the Fairfield blew a single whistle, and put her helm to port. It only states, that, as the vessels neared each other, the whistle was blown by the Fairfield, and her helm was put to port, and her head was sheered angling towards the New York shore. This averment is entirely consistent with the statement in the answer, that the blowing of the whistle by the Fairfield, and the putting of her helm to port, and the sheering that followed, took place when the Fairfield was on a course heading towards the Brooklyn shore, which, if continued, would have carried her in front of and past the America, on the side towards the Brooklyn shore, without any collision. It is not pretended in the libel, that there was any risk of collision, when the Fairfield blew her whistle and ported, or that the vessels were then meeting end on, or nearly end on, so as to involve risk of collision, nor have the libellants attempted to show by proof any such state of things. The whole case made by the libel is, that, inasmuch as the Fairfield blew a single whistle, and ported, it was the duty of the America to do the same; that the America failed to do so; and that, therefore, the America is solely responsible for the collision. The theory of the libel is based on the too prevalent and erroneous notion, that a steam vessel has a right, by the use of her steam whistle, to select for herself a particular course, and prescribe to another steam vessel a particular course, without regard to the provisions of the Act of Congress of April 29th, 1864, (13 *U. S. Stat. at Large*, 58,) for pre-

venting collisions on the water. If there was no risk of collision the moment before the Fairfield blew her whistle and ported, it was not her duty to port, and it was not incumbent on the America to port, and the Fairfield could not, by making a signal, impose any such obligation on the America. The libel makes out no case requiring the America to port her helm, under article 13 of the said Act. That article provides as follows: "If two ships under steam are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each shall pass on the port side of the other." This rule applies only to steamers meeting, and only to steamers meeting end on, or nearly end on, and only when there is risk of collision. It does not apply when the courses of the two steamers are such that there is no risk of collision. It does not apply to two steamers which must, if both keep on their respective courses, pass clear of each other. The only cases in which it applies are when each of the two vessels is end on, or nearly end on, to the other—that is, cases in which, by day, each vessel sees the masts, or the line of the keel, of the other, in a line, or nearly in a line, with her own masts, or the line of her own keel, and cases in which, by night, each vessel is in such a position as to see both of the side-lights of the other vessel. It does not apply to cases in which, by day, a steamer sees another steamer ahead, crossing her own course; nor, by night, to cases where the red light of one steamer is opposed to the red light of the other, or where the green light of one steamer is opposed to the green light of the other, or where a red light without a green light, or a green light without a red light, is seen ahead, or where both the green and the red lights are seen anywhere but ahead. No case is made by the libel, authorizing the Fairfield to port, or requiring the America to port. Nor does the testimony on the part of the Fairfield make out a case of meeting end on, or nearly end on, at the time the Fairfield blew

her single whistle and ported. On the other hand, the answer, and the testimony on the part of the claimants, make out a case where the Fairfield was on a course that would have carried her between the America and the Brooklyn shore, and the America was on a course that would have carried her to the New York side of the Fairfield, and the courses of the two vessels were such, when the Fairfield blew her single whistle and ported, that there would have been no collision, if both vessels had kept such courses. I think that the weight of the evidence is decidedly in favor of the statement contained in the answer as to the positions and courses of the two vessels at the time the Fairfield blew her single whistle and ported. If so, it follows, that the Fairfield, by porting, and attempting to cross the bows of the America, from the starboard side of the latter to her port side, left a course where there was no risk of collision, and threw herself in the way of the America, so as to make a collision inevitable. Unless the story in the answer is true, the collision could not have happened as it did, and the two vessels could not have struck each other in the way they did. For, as the Fairfield ported, and sheered towards the New York shore, the America, which was farther towards the New York shore than the Fairfield was, ported and sheered towards the Brooklyn shore, so as to avoid being struck on her starboard side by the Fairfield, and so as to receive the blow nearly on her bow, which was done. On the testimony of the pilot of the Fairfield, the collision could never have happened as it did. The Fairfield could not have been as far over towards the New York shore as is claimed for her by him. For, if she had been, inasmuch as the tide was ebb, and the America had rounded up the river, and could not have done so, on an ebb tide, until she was well over towards the Brooklyn shore, the vessels could not have come together bow on, as they did, after the Fairfield had ported. On the whole evidence, the col-

lision took place through the fault of the Fairfield, in porting and attempting to cross the bows of the America, when she had no right to do so. I see no fault in the navigation of the America. Her pilot heard the single whistle of the Fairfield when it was blown, and noticed her porting as soon as it took place, and he immediately stopped and reversed his engine, and ported his helm, to change the direction of the coming blow.

The libel is dismissed, with costs.

Beebe, Donohue & Cooke, for libellants.

B. D. Silliman, for claimants.

OCTOBER, 1869.

IN THE MATTER OF ABRAHAM VALK AND JAMES S. VALK, ON HABEAS CORPUS.

Arrest of Bankrupt by order of a State Court.

Where a bankrupt, having been arrested under an order of arrest issued out of a State Court, during the pendency of the bankruptcy proceedings, is brought before the bankruptcy Court on *habeas corpus*, that Court cannot go into an inquiry whether, in fact, the debt for which the bankrupt was arrested was one which, under the 33d and 34th sections of the bankruptcy Act, cannot be discharged by the discharge in bankruptcy, but can only inquire whether or not, from the face of the papers on which the State Court acted, in ordering the arrest, it appears that the State Court founded the order on such a debt.

Abraham Valk and James S. Valk filed their voluntary petition in bankruptcy in this Court, on the 15th of December, 1868, and were adjudicated bankrupts on the 21st of December, 1868. They had applied for their discharges, but had not yet received them, when, on the 14th of September, 1869, an order was made by a justice of the Supreme Court of the State of New York, in a civil suit brought therein against Abraham Valk, James

Valk, Morris Valk, and John Valk, by Benjamin Van Biema, requiring the sheriff of the city and county of New York to arrest Abraham Valk, James Valk, and John Valk, and hold them to bail in the sum of $38,000. On that order, Abraham Valk and James S. Valk were arrested by the said sheriff, on the 20th of September, 1869, and, being in his custody, by virtue of said order, were brought before this Court, on a writ of *habeas corpus*, and their discharge was applied for, on the ground that they were imprisoned in violation of that clause of the 26th section of the bankruptcy Act, which provides, that "no bankrupt shall be liable to arrest during the pendency of the proceedings in bankruptcy, in any civil action, unless the same is founded on some debt or claim from which his discharge in bankruptcy would not release him." The order of arrest was founded solely on an affidavit made by the plaintiff in the action.

Beebe, Donohue & Cooke, for the bankrupts.

John McKeon and *P. C. Talman*, for the sheriff and the creditor.

BLATCHFORD, J. The only question to be inquired into, on the return to this writ, is, whether or not the affidavit on which the order of arrest was founded shows that such order was founded on such a debt or claim as the 33d and 34th sections of the bankruptcy Act declare shall not be discharged by a discharge, namely, one created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character. This Court cannot go into an inquiry as to whether or not the debt alleged to be due to Van Biema was in fact one so created. It cannot try that question on affidavits or by proofs. It can only inquire whether or not, from the face of the papers on which the State Court acted in making the order of arrest, it appears that the State Court founded the order

on a debt so created. If this Court sees, from the face of those papers, that the State Court, in ordering the arrest, must have done so because it regarded the case made out by the papers to be one of a debt so created, it must regard the arrest as founded on such a debt, and must hold that the bankrupts were liable to such arrest. This was the doctrine laid down by this Court in the case of *In re Kimball*, (2 *Bankrupt Register*, 94,) and by Mr. Justice Nelson, in the Circuit Court, in the same case, (2 *Bankrupt Register*, 114.) There are several causes for which arrests in civil actions are allowed by the State law of New York, which do not amount to such fraud, embezzlement, or defalcation as are specified in the 33d section of the bankruptcy Act. Hence the necessity for an examination, by this Court, of the papers on which the arrest is founded—not to determine whether the bankrupt was liable, by the State law, to arrest, or whether he was arrested on a debt which is in fact not dischargeable in bankruptcy—but solely to determine whether the State Court intended, in ordering the arrest, to found it on a debt or claim which would not be discharged by a discharge in bankruptcy. The distinction is a plain one. If the bankrupt claims that, on the merits, the facts on which the State Court acted in ordering his arrest did not exist, he must try that question in the State Court, and not in this Court. Therefore, I cannot look into the voluminous evidence which was taken on the reference made under this writ. I can only examine the affidavit of the plaintiff, on which the order of arrest was made. I have done so, and am satisfied that the State Court must, on that affidavit, have believed that the debt in question was created by the fraud of the bankrupts, or by their defalcation while acting in a fiduciary character, and must, on that belief, have ordered the arrest.

The writ must be discharged, and the prisoners be remanded to the custody of the sheriff.

Eastern District of New York,

OCTOBER, 1869.

THE BARGE AVID.

COLLISION AT PIER.—ICE.—MOORING.—LEAK.

A bark and a barge were both moored alongside a pier. The bark's long-boat was hanging under her counter, close down to the water, from lines run from the stern, there being no davits. A floe of ice came into the slip, and parted the barge's lines, and drove her against the long-boat, and crushed it:

Held, That the barge was in fault, in not being properly moored;

That the bark was in fault, in reference to the position of the boat;

That the damages must be divided;

That costs would not be allowed for depositions which were illegible.

BENEDICT, J. This action is brought to recover for the destruction of the long-boat of the bark Algiers, by being crushed by the barge Avid, during the night of the 14th of February, 1869. The bark and the barge were both moored alongside pier 28, in the East river. The long-boat was hanging under the bark's counter, close down by the water, the ropes running from the stern, there being no davits. While in this position, the ice came into the slip, during the night, with sufficient force to part the barge's fastenings, and drive her ahead upon the long-boat, thus doing the injury complained of.

It is manifest that the long-boat was swung in an improper and dangerous place, where it was greatly exposed to injury from neighboring vessels. For this reason, the bark must be held in fault. (*The Phœnix*, 3 *Blatch. C. C. R.*, 273.)

The remaining question is, whether there was fault on the part of the barge, in regard to her fastenings,

which should render her also responsible for the accident.

On the part of the bark, it is proved by the mate, that he went on board the barge, on hearing the crash; that he then examined the barge; that he found the stern line had parted; and that he, at the time, complained to the master of the barge, that his line was not sufficient to hold his vessel. The master of the bark, also, is called, who does not appear, however, to have examined the lines of the barge until morning, when he saw the stern line that had parted.

On the part of the barge, no witness is called but the claimant himself, who swears that the barge was made securely fast to the pier, by stem and stern lines, and a seven-inch breast line; that a floe of ice came in the slip, which parted the stern line and the bow line, and pulled off the cavil, to which the breast line was fastened, and thus his barge was driven into the long-boat. He further says, that he hove his boat back by the windlass. But in the answer, which is sworn to by this same claimant, it is expressly stated, that but one line parted, "leaving two lines still secured to the pier; that in a few moments the barge sprung back to her lines, and it was then discovered that the long-boat had been smashed." The account given in the answer thus differing from the account given upon the stand, a doubt is raised as to the sufficiency of the barge's fasts, which is further strengthened by the fact that no vessel broke adrift, except this barge, and that the barge herself received no injury from the pressure of the ice. In this posture of the evidence, it must be held that the claimant has failed to show that the drifting of the barge was caused by the overwhelming power of the ice, and not from any carelessness or neglect in her fastenings, and that the barge is also chargeable with fault.

There being, then, fault found on both sides, the damages will be apportioned.

In taxing the costs, the clerk will strike from the libellant's bill of costs the fees for the depositions, because of their extreme illegibility, as presented to the Court.

A reference may be had, to prove the amount of the damage, unless the parties can agree on the sum.

OCTOBER, 1869.

ONE LARGE WATER TUB, &c.

INFORMER'S SHARE.—COSTS.—VALUE LESS THAN $250.

The proviso in the 91st section of the Act of Congress of March 2d, 1799, (1 *Stats. at Large, p.* 697,) that where the value of the property forfeited is less than $250, the share of the United States is to be applied towards the costs of the prosecution, is general in its application, and is applicable to forfeitures under the internal revenue laws.

Treasury regulations on that subject, issued under the authority of the 9th section of the Act of July 13th, 1866, (14 *Stats. at Large, p.* 145,) are not binding in cases which come within that proviso.

BENEDICT, J. The question raised in this case is, whether, in a case arising under the internal revenue laws, where the value of the forfeited property is less than $250, the portion of the forfeiture which accrues to the United States shall be applied to the costs of prosecution, as is provided in the 91st section of the Act of 1799, or whether, as provided in the treasury regulations of September 2d, 1867, the share allotted to the informer shall be subject to a proportionate deduction for costs and charges.

Treasury regulations, upon subjects like the present, issued within the scope of the authority conferred by the 9th section of the Act of July 13th, 1866, (14 *Stat. at Large, p.* 145,) have hitherto been considered as effective regulations, and no question as to the validity of the

statute upon which they are based is here raised. But it is insisted that if the regulation referred to is intended to apply to cases like the present, it is beyond the scope of the authority conferred by the Act of July 13th, 1866, above referred to, which confines the action of the Secretary to cases not otherwise provided for, and thus, as it is claimed, excludes cases where the value is under $250, inasmuch as such cases are provided for by the Act of 1799.

Upon an examination of the words of the 91st section of the Act of 1799, I am of the opinion that the provision in question must be considered to be general in its effect, applicable to all cases, and not intended to be confined to the forfeitures which might arise under the Act containing the proviso, or any other particular Act. This appears by the studied omission from this provision of the words, "incurred by virtue of this Act," which appear in the previous parts of the section, and also by the fact that the condemnations provided for are not required by the proviso to have arisen under particular laws or classes of laws. Nor can it be claimed that any particular class of laws was within the intention of the legislature; for, at the time of the passage of the proviso, seizures, condemnations, and sales of goods as forfeited, were provided for by several statutes, some of them having no relation to the revenue—such as the Act of Sept. 1st, 1789; the Act of March 3d, 1791, which relates to taxes on domestic spirits; the Act of May 8th, 1792, in regard to 90-gallon casks; the Act of Dec. 31st, 1792, in regard to registration of ships; the Act of March 22d, 1794, in regard to the slave trade; the Act of July 9th, 1798, in regard to captured vessels of France. Under all these, and other Acts, seizures, condemnations, and sales had been provided for, and they are clearly covered by the words of the provision in the Act of 1799, which is, in terms, made applicable to all cases where a seizure, condemnation, and sale of goods shall take place within the United States.

Until repealed, therefore, the Act of 1799 must be held to be controlling, in the cases to which its terms apply, as well when the case arises under the internal revenue laws, as well as those under the customs laws. If, then, it was intended by the regulation of September 26th, 1867, to forbid the appropriation of the Government's share of a forfeiture to the payment of the costs, in cases where the value is less than $250, the regulation must be held to be unauthorized, and the appropriation must be made, in accordance with the 91st section of the Act of 1799.

It is accordingly ordered, in this case, that the share of the proceeds of the property forfeited in this action, which accrues to the United States, be applied toward payment of the costs of the prosecution.

OCTOBER, 1869.

THE SCHOONER MARY EVELINE, &c.

JOHN W. PETTY *et al. v.* HENRY B. MERRILL *et al.*

COLLISION IN EAST RIVER.—SAILING VESSELS IN NARROW CHANNEL.—DANGEROUS MANŒUVRE.

A vessel, sailing free, and meeting a vessel beating, has no right, by going ahead, instead of astern of the vessel beating, to compel the latter to go about before beating out her tack.

Where, in a narrow channel, a sloop sailing free, and able to take either side of the channel, met two schooners beating close to each other, and taking the chance of passing them before or after they should tack, attempted to pass ahead of them, and was in the act of passing, where she could neither luff or keep off, when the rear schooner came into the wind, and so was run into by that schooner:

Held, That the sloop was in fault for placing herself in such a position, when she had no room to pass. She should have gone astern of the schooners before they tacked.

BENEDICT, J. These are cross-actions; one brought in the Southern District of New York, by the owners of the sloop "Ethan Allen" to recover the damages caused by a collision between that sloop and the schooner "Mary Eveline," which occurred in the Narrows, between Blackwell's Island and Long Island, on the afternoon of the 20th of September, 1868; the other brought in this District by the owners of the "Mary Eveline" to recover the damages sustained by their vessel in the same collision.

The actions were tried together before me, and the following facts were made to appear: The wind, at the time of the collision, was a strong sailing breeze, blowing six to eight knots from the westward; the tide was two hours ebb, the weather fair. The schooner "Mary Eveline," with a reef in her mainsail, was beating toward New York, between Blackwell's Island and Long Island, and was just behind, but gaining upon the schooner "Charles Hawley," a vessel also beating in the same direction. On the last tack before the collision, both the schooners tacked close to the Long Island shore, and stood over for a point below the coal dock, and nearly opposite the Lunatic Asylum, on Blackwell's Island, the legs being nearly equal. When near the Blackwell's Island side, the Hawley again tacked, and filled away up on her starboard tack, and the "Mary Eveline," which was at the time very near, swung close to her stern, her larboard fore shrouds just clearing the "Hawley's" boom, and so she came up to the wind in the act of tacking. At this moment, the sloop Ethan Allen was passing up the Narrows close to Blackwell's Island, with her main-sheet off full-length, her boom off to port—her main peak slacked a little, her main-topsail clewed up and hanging, and was struck by the "Mary Eveline," just as the latter came up to the wind, the "Eveline" hitting the "Ethan Allen," at the starboard cat-head, the jib-boom of the Eveline going between the mast and

the lee-rigging of the Allen. The blow caused the Allen to sink in a few moments, and injured the Eveline to a considerable amount.

It is obvious from this statement that, according to well-settled law, the burden is upon the Ethan Allen to show a good reason for not avoiding the Mary Eveline. This she has endeavored to do. She shows very satisfactorily that she could not have avoided the Mary Eveline by keeping away, for she was on a course as close to the west shore, as her boom would permit at that point; and, moreover, if she had kept off, she would have been in danger of receiving the blow on her broadside. She also shows that it was impossible for her to have avoided the Mary Eveline by porting after the Hawley luffed, as the three vessels were situated. But she fails to justify placing herself where she could neither port nor keep off to avoid the Eveline, but, of necessity, must strike that vessel without any false manœuvre on the part of the latter. A fault is charged upon the Mary Eveline in the pleadings, that she stood on too far to leeward of the Hawley, whereby the Ethan Allen was prevented from passing her. But the evidence shows that the Eveline tacked about in the wake of the Hawley. The order, "Hard-a-lee," was given on the Eveline, as her fore shrouds cleared the Hawley's boom, and the fore sheet was at once let go. The Eveline was entitled to beat out her tack, and was compelled, by her proximity to the Hawley, to swing round her stern, and she had the right to do this in the way she did.

The Ethan Allen, by passing ahead, instead of astern, sought to force the Eveline to tack to the east of the Hawley, or run the risk of hitting the Allen when she passed. Whereas, the Eveline, being close-hauled, should have been left to beat out her tack and the Ethan Allen should have kept out of her way by passing astern on the Long Island side instead of attempting to

pass ahead of the schooners, and on the Blackwell's Island side. She had a fair and full breeze, which enabled her to stem the tide, and was carrying her at the rate of some three miles an hour by the land. She saw the schooners beating down, and when they stood over from the Long Island shore upon their larboard tack, she had then two courses open; one to hug Blackwell's Island, trusting to the chance of passing the schooners before or after they should tack at Blackwell's Island. The other to luff out into the stream, and pass the schooners on the Long Island side. It is clear that the latter was the proper course, and that she could thus have avoided all danger of collision.

It was urged upon the argument that, in such a tide, the sloop could not, with safety, leave an eddy, which is supposed to make along Blackwell's Island, and attempt to pass up in the tide-way; and, inasmuch as she could not stop, must be held free from fault. No evidence in the case sustains this position, and I have no doubt that she could have luffed out into the stream without difficulty or danger.

In the absence of any evidence tending to show such a course to have been impracticable, I hold the sloop to be in fault for not thus avoiding the Eveline.

Let the decree in the action of John W. Petty *vs.* Henry B. Merrill be for the libellants, with an order of reference to ascertain the amount; and, in the action of Henry B. Merrill against the Mary Eveline, let the libel be dismissed, with costs.*

For the Ethan Allen, *F. A. Wilcox* and *W. R. Beebe.*

For the Mary Eveline, *R. C. Huntley.*

* These cases were affirmed by the Circuit Court on appeal in November, 1870.

In the Matter of Thomas Ferrens, on Habeas Corpus.

Southern District of New York,

NOVEMBER, 1869.

HABEAS CORPUS.—ENLISTMENT OF A MARRIED MAN.—OATH OF ENLISTMENT.—ARTICLES OF WAR.

A writ of *habeas corpus* was issued on the petition of the wife of F., to inquire into the regularity of the enlistment of F. into the army of the United States. The discharge of F. was claimed on three grounds—(1) That the oath of enlistment taken by him was taken before an officer of the army, and not before a civil magistrate, whose services could easily have been obtained; (2) That he had a wife and child when he enlisted, and his enlistment was, therefore, contrary to paragraph 930 of the Rules and Regulations for the Recruiting Service of the Army of the United States, prescribed by the Secretary of War, which were claimed to have the force of a statute, under the 37th section of the Act of July 28th, 1866 (14 U. S. Stat. at Large, p. 338); (3) That he was intoxicated when he enlisted:

Held, That the wife of F. might prosecute the writ;

That the oath taken by F. was substantially the oath prescribed by the 18th section of the Act of January 11th, 1812, (2 U. S. Stat. at Large, p. 673,) and not that prescribed by the Act of April 10th, 1806, (*id.* p. 361);

That the Act of January 11th, 1812, contained no provision requiring the oath to be taken before a civil magistrate;

That the "oath of enlistment" mentioned in the 3d section of the Act of June 12th, 1858, (11 U. S. Stat. at Large, p. 336,) and the "oath of allegiance" mentioned in the 11th section of the Act of August 3d, 1861, (12 *U. S. Stat. at Large, p.* 289,) are the same, and that, under the latter Act, the oath taken by F. was properly administered by a commssioned officer of the army;

That, as the 37th section of the Act of July 28th, 1866, authorizes the Secretary of War to report a Code of regulations "for the regulation of the army and of the militia in actual service," embracing "all necessary orders and forms of a general character for the performance of all duties incumbent on officers and men in the military service," such regulations could not be held to apply to the question as to who may lawfully be enlisted into the army; nor were existing regulations on that subject made statutory by the provision in that section, that "existing regulations are to remain in force until Congress shall have acted on that report;"

That, therefore, the 1st section of the Act of December 10th, 1814, (3 U. S. Stat. at Large, p. 146,) which authorizes the enlistment of "any free, effective able-bodied man, between the ages of 18 and 50 years," was not by implication repealed by the 38th section of the said Act of 1866;

That paragraph 930 of the Regulations above referred to was, therefore, only a regulation of the War Department, directory to its subordinates, and the fact that F. had a wife and child did not invalidate his enlistment;

That, moreover, as, when he enlisted, he signed a declaration that he had neither wife nor child, and as he had received the rations and clothing of a recruit, and had performed the duties of a recruit for twenty days, when the petition for a *habeas corpus* was presented, he must be held to have ratified his contract of enlistment;

That he was not intoxicated when he enlisted;

That the writ must be discharged, and the recruit be remanded.

BLATCHFORD, J. This is a petition for a writ of *habeas corpus*, signed and verified by Mary Ferrens, the wife of Thomas Ferrens. It sets forth that the said Thomas Ferrens is imprisoned or restrained of his liberty by General T. H. Neill, at Fort Columbus, in the harbor of New York, and avers that the cause or pretence of such confinement or restraint is, that it is alleged that the said Thomas Ferrens enlisted as a soldier in the army of the United States for the period of five years; that such enlistment was procured while the said Thomas Ferrens was intoxicated, and was so much under the influence of liquor, that he did not know what he was doing; and that all papers signed by him at the time of such enlistment, and all acts done by him with reference thereto, were done and signed while he was so intoxicated and incapable of knowing his own mind, or what he was doing. The petition also avers, that the said Thomas Ferrens is a married man, having a wife and child dependent upon him for support. The writ was issued, and, in obedience to it, General Neill produces the body of the said Thomas Ferrens, and makes return to the writ, that the said Thomas Ferrens is a private soldier in the army of the United States, and held to service therein by virtue of a contract of enlistment, entered into by him with the United States, a copy of which is annexed to the return, and the original of which is submitted to the inspection of the Court. The return further states, that the said recruit, of the general service, United States army, was minutely and critically inspected, after being received at

the depot of Fort Columbus, New York harbor, with his said enlistment paper, in the manner and mode provided in paragraph 976 of the General Regulations for the Army of the United States, and accepted into the service as a duly enlisted able-bodied soldier, and that said Thomas Ferrens has performed the duties of a soldier in said army, and received such clothing and rations as are established by law. The petitioner, Mary Ferrens, traverses the return, and states, that the oath of enlistment, as appears by the pretended contract of enlistment annexed to and forming part of the return, was administered to the said Thomas Ferrens by Brevet Brigadier-General J. B. Kiddoo, U. S. A.; that such enlistment oath could not be administered by the said Kiddoo, as a commissioned officer in the army of the United States, except in cases, as provided by the laws of the United States, where the services of a civil magistrate, authorized to take oaths, could not be obtained, and that such services of such civil magistrate were not obtained, nor was any effort made by the said recruiting officer, Kiddoo, or any other officer, to obtain the same, although the services of such civil magistrate could have been easily obtained by such officer; and that the petitioner has offered, and is now ready and willing, to repay and return to the respondent, or other officer authorized to receive the same, the pay, uniform and clothing furnished to the said Ferrens by the United States. The oath of enlistment annexed to the return is as follows: "State of New York, town of New York. I, Thomas Ferrens, born in Wexford, in the State of Ireland, aged twenty-six years, and by occupation a soldier, do hereby acknowledge to have voluntarily enlisted, this fifteenth day of September, 1869, as a soldier in the army of the United States of America, for the period of five years, unless sooner discharged by proper authority; do also agree to accept such bounty, pay, rations and clothing as are, or may be, established by law; and I, Thomas Ferrens, do

solemnly swear, that I will bear true faith and allegiance to the United States of America, and that I will serve them honestly and faithfully against all their enemies or opposers whomsoever, and that I will observe and obey the orders of the President of the United States, and the orders of the officers appointed over me, according to the rules and articles of war. Thomas Ferrens. Sworn and subscribed to at New York City, this 15th day of September, 1869, before J. B. Kiddoo, Brevet Brig.-Gen., U. S. A." Testimony has been taken as to the matters alleged in the petition, the return and the traverse, and the question is now to be determined, whether the recruit is entitled to his discharge.

It is claimed on the part of the United States, that the writ must be dismissed, because it is not prosecuted by the recruit himself; that no one can prosecute it but himself, unless it be shown that he is debarred the opportunity of preferring a petition himself; and that such fact is not shown in this case. It has never been understood that, at common law, authority from a person unlawfully imprisoned or deprived of his liberty was necessary to warrant the issuing of a *habeas corpus*, to inquire into the cause of his detention. In the case of *The People* v. *Mercein*, (3 *Hill*, 399, 407,) the Supreme Court of New York intimate that such authority from the person detained is not ordinarily necessary. In the case of Ashby and White, (14 *Howell's State Trials*, 814,) the House of Lords, in England, in 1704, resolved "that every Englishman, who is imprisoned by any authority whatsoever, has an undoubted right, by his agents or friends, to apply for and obtain a writ of *habeas corpus*, in order to procure his liberty by due course of law." This resolution was assented to by the House of Commons, (*page* 826.) In the present case, the petitioner states, in her petition, that she is the wife of the recruit, and is dependent upon him for support. This is, I think, sufficient to authorize her to prosecute the writ.

The first ground urged for the discharge of the recruit is, that General Kiddoo had no authority to administer the oath of enlistment to him, it being shown that the services of a civil magistrate could have been obtained, and that no effort was made to obtain the services of such a magistrate. The oath taken by the recruit, in this case, so far as it is a promissory oath, is, in substance, nothing but an oath of allegiance. It is not, in terms, the oath prescribed by the 10th article of the articles prescribed for the government of the armies of the United States, by the Act of April 10th, 1806, (2 *U. S. Stat. at Large*, 361,) and by paragraph 935 of the Army Regulations, but it is, with an immaterial variation, the oath prescribed by the 18th section of the Act of January 11th, 1812, (2 *U. S. Stat. at Large*, 673.) This last section is not repealed, and it was manifestly the intention to administer to the recruit the form of oath prescribed in it; and that was, in substance, done. The two oaths are, to all intents, the same. Each is an oath of allegiance. and each, when taken by a recruit, on his enlistment, is properly called an oath of enlistment. So much of the form of the oath taken by the recruit, in the present case, as is not an oath of allegiance, is an acknowledgment that he has enlisted. The Act of April 10th, 1806, article 10, authorized and required the oath therein prescribed to be taken before "the next justice of the peace, or chief magistrate of any city or town corporate, not being an officer of the army, or, where recourse cannot be had to the civil magistrate, before the judge advocate." The Act of January 11th, 1812, contained no provision as to the officer before whom the oath prescribed in the 18th section thereof should be taken. The Act of June 12th, 1858, section 3, (11 *U. S. Stat. at Large*, 336,) provides, "that it shall be lawful for any commissioned officer of the army to administer the prescribed oath of enlistment to recruits, provided the services of a civil magistrate, authorized to administer the same, cannot be obtained."

In the Matter of Thomas Ferrens, on Habeas Corpus.

The Act of August 3d, 1861, section 11, (12 *U. S. Stat. at Large*, 289,) provides, that, in all cases of enlistment and re-enlistment in the military service of the United States, the prescribed oath of allegiance may be administered by any commissioned officer of the army." The counsel for the petitioner suggests that it is doubtful whether the Act of 1858 means, by the words, "the prescribed oath of enlistment," the same thing that the Act of 1861 means, by the words, "the prescribed oath of allegiance," and whether the proviso found in the 3d section of the former Act is repealed by the provisions of the 11th section of the latter Act. There can be no doubt that the two Acts refer to one and the same oath. Only one oath is prescribed by law to be taken by a person enlisted or enlisting in the military service of the United States, and that is an oath of allegiance. It is, therefore, properly called an oath of enlistment, as well as an oath of allegiance. Nor can there be any doubt that the intention and effect of the Act of 1861 are to give to a commissioned officer of the army the power to administer the prescribed oath of allegiance, in all cases of enlistment and re-enlistment in the military service of the United States, without reference to the question whether the services of a civil magistrate, authorized to administer the same, can or cannot be obtained. The oath, in this case, was, therefore, administered by a proper officer.

The second ground urged for the discharge of the recruit is, that he had a wife and a child at the time he was enlisted, and has now a wife and a child and that his enlistment was, therefore, unlawful. Paragraph 930 of the regulations for the recruiting service of the army of the United States, prescribed by the Secretary of War, provides, that "no man having a wife or a child shall be enlisted, in time of peace, without special authority obtained from the adjutant-general's office, through the superintendent;" but that "this rule is not to apply to soldiers who re-enlist." It is claimed, on

the part of the petitioner, that this rule or regulation has, by virtue of the 37th section of the Act of July 28th, 1866, (14 *U. S. Stat. at Large*, 338,) the force of a statutory enactment. That section provides as follows: "That the Secretary of War be, and he is hereby, directed to have prepared, and to report to Congress, at its next session, a code of regulations for the government of the army, and of the militia in actual service, which shall embrace all necessary orders and forms of a general character, for the performance of all duties incumbent on officers and men in the military service, including rules for the government of courts-martial. The existing regulations to remain in force until Congress shall have acted on said report." The regulation in question was in force on the 28th of July, 1866. The 38th section of the same Act repeals all laws and parts of laws inconsistent with its provisions. The 1st section of the Act of December 10th, 1814, (3 *U. S. Stat. at Large*, 146,) authorizes the enlistment into the army of the United States, of "any free, effective, able-bodied man, between the ages of eighteen and fifty years." That enactment authorizes, by that language, the enlistment of a man having a wife, and of a man having a child, and it has never been directly repealed, that I have been able to find. The question is, whether paragraph 930 of the recruiting regulations is to be considered as a statutory enactment, by force of the 37th section of the Act of 1866, and whether, if so, the provision of the 1st section of the Act of 1814 is to be regarded as inconsistent with the said paragraph, and, therefore, as repealed by the 38th section of the Act of 1866. A repeal by implication is not favored. The code of regulations, which, by the 37th section of the Act of 1866, the Secretary of War is directed to report to Congress, at its then next session, is a code of regulations "for the government of the army, and of the militia in actual service," and the then existing regulations, which it is provided by that

section shall remain in force until Congress shall have acted on said report, are regulations "for the government of the army, and of the militia in actual service." The 37th section also directs that the new regulations shall "embrace all necessary orders and forms of a general character, for the performance of all duties incumbent on officers and men in the military service." Regulations for the government of the army, and orders and forms respecting duties incumbent on men in the military service, cannot, without doing violence to language, be construed to apply to the question as to who may lawfully be enlisted in the army. They can only apply to persons who are lawfully in the military service, leaving entirely outside the question as to whether a particular person is in such service. The question as to whether a person is or is not lawfully enlisted in such service, cannot, in any proper sense, be determinable by or under a regulation for the government of the army—that is, for the government of persons enlisted in such service. When it is determined, otherwise, that the person is lawfully enlisted in such service, then the regulations referred to in the 37th section of the Act of 1866 become regulations affecting him, but not till then. Paragraph 930 is, therefore, not one of the regulations referred to in such 37th section, as regulations which are to remain in force until Congress shall have acted on the report therein named. It is a mere regulation made by the War Department, directory to its subordinates, and not a statutory enactment. An enlistment not in compliance with it is not made in violation of any statute, but is expressly authorized by statute.

If this Court would assume, in any case, to discharge a recruit on *habeas corpus*, because he had a wife when he was enlisted, in time of peace, and no special authority to enlist him was obtained from the Adjutant-General's office, through the superintendent, this is not a proper case for a discharge. The recruit declared, by a declara-

tion signed by him when he enlisted, that he had neither wife nor child, and he had, when this petition for a *habeas corpus* was brought, been in the service for twenty days. He enlisted voluntarily, and it appears that he has, since his enlistment, voluntarily performed the duties of a soldier, and received, without protest or remonstrance, the rations and clothing allowed by law to a recruit. Under these circumstances, he must be held to have ratified his contract of enlistment, and the United States, by the proceedings in this case, must be regarded as having adopted such enlistment, after ascertaining that he had a wife when he enlisted.

On the question of intoxication, the evidence satisfactorily shows that the recruit was carefully examined by the proper officers at the time of his enlistment, and that he was not intoxicated at the time, or in any manner unconscious of what he was doing. Every thing in regard to his enlistment appears to have been conducted with proper care, caution and deliberation, and nothing is shown to warrant his discharge.

The writ is, therefore, discharged, and the recruit is remanded to service under his proper officer.

John C. Darrow, for the petitioner.

Lt. Asa B. Gardner, for the United States.

NOVEMBER, 1869.

IN THE MATTER OF JAMES R. DEY, A BANKRUPT.

LIENS ON BANKRUPT'S ESTATE.—MECHANICS' LIEN LAW OF NEW JERSEY.

A lien, to be recognized by the bankruptcy Court, as a valid lien on property

which passes from the bankrupt to the assignee in bankruptcy by virtue of the proceedings in bankruptcy, must be a lien at the time of the commencement of those proceedings.

A bankrupt filed his voluntary petition on May 17th, 1869. Among the property which passed to the assignee were buildings and machinery situated in New Jersey, upon which work had been done prior to May 17th, 1869, for which mechanics' liens were claimed on the buildings, under the laws of New Jersey, the earliest claim of such lien, however, being filed on May 29th, 1869. The assignee in bankruptcy filed a petition asking for a determination as to the validity of the claims of lien:

Held, That under the mechanics' lien law of New Jersey, the lien did not exist as a lien upon the property at the time of the commencement of the bankruptcy proceedings;

That, the assignee must distribute the estate without reference to the mechanics liens, as such.

THIS case came before the Court on testimony taken under an order of reference, on a petition presented to the Court by the assignee in bankruptcy, asking for a determination as to the validity of certain alleged liens, claimed as mechanics' liens, under the laws of New Jersey, on certain real estate, buildings and fixed machinery situated on the Hackensack river in New Jersey, owned by the bankrupt, and used by him in his business as a manufacturer there of poudrette.

The petition in bankruptcy, which was a voluntary petition by the bankrupt, was filed on the 17th of May, 1869. The earliest claim of lien, in respect to any of the alleged mechanics' liens, that was filed under the law of New Jersey, was filed on the 29th of May, 1869. The work was done and the materials were furnished, in respect of which the liens were claimed, prior to the 17th of May, 1869.

It was contended, on the part of the assignee in bankruptcy, that, under the laws of New Jersey, no lien had attached to the property in question, in favor of any one of the claimants of the alleged mechanics' liens, at the time of the commencement of the proceedings in bankruptcy. The Act in question was passed on the 11th of March, 1853, (*Nixon's Digest, page* 487, *2d ed.*,

page 571, *4th ed.*) The 1st section of that Act declares, that every building shall be liable "for the payment of any debt contracted and owing to any person for labor performed or materials furnished for the erection and construction thereof, which debt shall be a lien on such building, and on the land whereon it stands, including the lot or curtilage whereon the same is erected." The 5th section provides, that "every person intending to claim a lien upon any building or lands by virtue of this Act, shall, within one year after the labor is performed or the materials furnished, for which said lien is claimed, file his claim in the office of the clerk of the county where such building is situate, which claim shall contain these matters," specifying four. The same section further provides, that, "when such claim shall not be filed in the manner or within the time aforesaid, or if the bill of particulars," which is one of the four matters, "shall contain any wilful or fraudulent misstatement of the matters above directed to be inserted therein, the building or lands shall be free from all lien for the matters in such claim." The 8th section provides, that, "when a claim is filed agreeably to the provisions of this Act, upon any lien created thereby, the same may be enforced by suit, in the Circuit Court of the county where such building is situated, which suit shall be commenced" and prosecuted in the manner thereafter specified. The 9th section provides, that the declaration in the suit "shall conclude with an averment that said debt is, by virtue of the provisions of this Act, a lien upon such building and lot, describing the same as in such claim," and that the owner of the land and building "may plead that said house or land are not liable to said debt, and, in such case, it shall be necessary for the plaintiff, to entitle him to judgment against the house and lands, to prove that the provisions of this Act, requisite to constitute such lien, have been complied with." The 12th section provides, that "no debt shall be a lien by virtue of this Act, unless

a claim is filed as hereinbefore provided, within one year from the furnishing the materials or performing the labor for which such debt is due." The 13th section provides, that "such land and building may be discharged from any lien created by this Act," in four specified ways: (1.) By payment and a receipt therefor, given by the claimant, and filed by the clerk, and an entry made by him in the lien docket, opposite the entry of the lien; (2.) By paying to the clerk the amount of the claim; (3.) By the expiration of the time limited for issuing a summons on the lien claim, without any summons being issued, or without notice thereof endorsed on said claim; (4.) By showing, by the filing of an affidavit, that the owner gave a notice to the claimant, requiring him to commence suit to enforce such lien in thirty days from the service of such notice, and that such time has elapsed without such suit being commenced or without an entry of the time of issuing such summons being made on such claim. The 14th section provides, that "all lien claims for erecting the same building shall be concurrent liens upon the same and the land whereon the same is erected."

J. H. Strahan, for the assignee.

J. H. Randolph and *W. H. Peckham*, for the mechanics' lien creditors.

BLATCHFORD, J. It is impossible to read the provisions of the Act in connection with each other, as a systematic whole, without seeing that it is not the intention of the statute that the performing of the labor or the furnishing of the materials, shall, of itself, constitute a lien for the debt upon the building or the land. The creating of the debt by such means only gives a right to the creditor to constitute the lien, by filing the claim within the time and in the manner specified. If he does not, as the 9th section declares, comply with the provisions of the Act which are made requisite to consti-

tute the lien, there is no lien; and the 12th section expressly declares, that the debt shall not be a lien, that is, shall not become at all a lien, unless the claim is filed in accordance with the 6th section, and within one year from the furnishing of the materials or the performing of the labor. It is true, that the 11th section of the Act provides that the deed to be given on a sale of a building and lot on a special writ of *fieri facias* on a judgment against such building and lot, shall convey the estate in the lot which the owner had at or any time after the commencement of the building, within one year before the filing of the claim in the clerk's office. But this is merely a provision that, when the lien is created or constituted by the due filing of a claim, it becomes a lien by relation, as of the time of the commencement of the building. Until the claim is filed, the lien rests only in *posse*. When such claim is filed, it becomes a lien in *esse*, as of the time when the building was commenced. That there is no lien until the claim is filed, is the view held of the statute by the Court of Chancery of New Jersey. In the case of *Morris County Bank* v. *Rockaway Manufacturing Co.*, (1 *C. E. Green*, 150, 161,) the Court (Chancellor Green,) held, that a claim not filed according to the requirement of the statute, constituted, under the provisions of the law, no encumbrance on the premises; and that the fact that a judgment at law had been entered upon the lien, when the lien claim had not been filed pursuant to the statute, did not give the debt any priority in payment or advantage over liens upon which judgment had not been rendered. No decision of any Court in New Jersey was cited, on the argument, in conflict with these views.

There was, therefore, no lien, in this case, in respect to any of the alleged mechanics' liens, at the time the petition in bankruptcy was filed. The filing of such petition, followed by an adjudication of bankruptcy, is made, by section 38 of the bankruptcy Act, the com-

mencement of proceedings in bankruptcy under the Act. By section 14 of the Act, the assignment to the assignee in bankruptcy relates back to the commencement of the proceedings in bankruptcy. It is claimed, on the part of the holders of the alleged mechanics' liens, that, although their lien claims were filed after the commencement of the proceedings in bankruptcy, yet, as they were filed within the time limited by the statute of New Jersey, they became, by such filing, liens which must be respected and allowed by this Court. The law is otherwise. Any lien, to be recognized by the bankruptcy Court as a valid lien on property which passes from the bankrupt to the assignee by virtue of the proceedings in bankruptcy, must be a lien at the time of the commencement of the proceedings in bankruptcy. (*In re Bernstein*, 2 *Ben.*, 44; *In re Schnepf*, *Id.*, 72; *In re Smith*, 1 *Bankrupt Register*, 169; *Pennington* v. *Sale*, *Id.*, 157; *Jones* v. *Leach*, *Id.*, 164; *In re Ellis*, *Id.*, 154; *In re Harsberger*, 2 *Id.*, 33.) The property in question passed under the jurisdiction of this Court on the 17th of May, 1869, so as to cut off any liens subsequently sought to be imposed on it, and no proceeding thereafter, under the State law, to impose on it a lien not then created or constituted, was valid. If the subsequent imposition of the lien in this case were to be upheld, it would be difficult to deny, on principle, the right of a judgment creditor, by a judgment recovered before the commencement of the proceedings in bankruptcy, to create, as against the assignee in bankruptcy, a lien on personal property, by issuing or levying an execution thereon after the commencement of such proceedings, but within the time allowed by the law of the State therefor.

It results, that the assignee must distribute the estate without reference to the alleged mechanics' liens, as liens.

NOVEMBER, 1869.

THE STEAM FERRY-BOAT GEORGE LAW.

THE STEAMBOAT T. V. ARROWSMITH.

COLLISION IN EAST RIVER.—STEAMBOATS MEETING.—SPEED.—STATE LAW.—APPORTIONMENT OF DAMAGES.—COSTS.

A steamboat, the A., was going up the East river, against the ebb tide. Off her port bow or side was a ferry-boat, going the same way. The pilot of the A., seeing another ferry-boat, the L., coming down the river, a little to the starboard of his course, heading about two points on his course, and apparently crossing it, blew two whistles, and starboarded his wheel, and shortly afterwards stopped and backed his boat, but she was struck on her starboard side, by the starboard bow of the L., which, after seeing the sheer of the A., had also starboarded her wheel. The L. was coming down the river, at the rate of eleven knots an hour, with the tide, and her engine was slowed, stopped, and backed, before the collision, but not soon enough to stop her headway, while the A. was, at the time of the collision, about still in the water.

Held, That, on the evidence, the two vessels were meeting end on, or nearly so, when the two whistles of the A. were blown, and that, under the 18th article of the Act of April 29th, 1864, it was the duty of each to port her helm;

That if, as was claimed by the A., the L. was crossing her course from the starboard side, it was the duty of the A., under article 14, to have kept out of her way, and the duty of the L. to have kept her course;

That the A., therefore, should have stopped and backed before she blew her two whistles;

That the A. was not excused from the duty of porting her helm, by the law of the State of New York, requiring steamboats navigating the East river to keep in the middle of it;

That the A. was not excused from porting, under the 19th article of the Act of April 29th, 1864, by reason of the presence of the other ferry-boat on her port bow, and danger of a collision between her and the L., if the L. kept on;

That the L. was also in fault, for running at too great speed, contrary to the 1st section of the Act of the State of New York, of April 12th, 1848;

That, independent of that statute, her speed was too great, and it was her duty, under article 16 of the Act of 1864, to have slackened her speed sooner than she did;

That, both vessels being in fault, the damages must be apportioned;

The question of costs was reserved till after the apportionment was made.

BLATCHFORD, J. These are cross libels, the first one having been filed by the owners of the steamboat T. V. Arrowsmith, against the steam ferry-boat George Law, and the second one having been filed by the owners of the latter vessel against the former, to recover for the damages sustained by the respective vessels, by a collision, which occurred between the two vessels, on the 28th of December, 1867, shortly after three o'clock in the afternoon, in the East river, between the city of New York and the city of Brooklyn, by which both vessels were injured. The Arrowsmith was on a trip from pier 24 East river, through the East river and Hell Gate, to points beyond. The George Law was on a trip on her regular ferry route, from her slip at the foot of Bridge street, in Brooklyn, to her slip between Oliver and James streets, in New York. The tide was about half ebb, and running with considerable strength at the middle of the the river, which was about where the collision happened. The weather was clear, and there was scarcely any wind.

The libel by the owners of the Arrowsmith was filed on the 18th of January, 1868, and their answer to the libel filed by the owners of the George Law was filed on the 5th of October, 1868. There is some variation in the story of the Arrowsmith, as set forth in this libel, and as set forth in this answer. Both of these pleadings allege that the Arrowsmith had got out into the middle of the river, and had straightened up, and was well on her course up the middle of the river, prior to the collision, when the pilot of the Arrowsmith observed the George Law off the Arrowsmith's starboard bow, approaching down the East river, on a diagonal course, but nearly head on to the Arrowsmith. The answer says, that the George Law was then more than a quarter of a mile off. The libel says nothing on the subject of such distance. The libel says, that the pilot of the Arrowsmith, observing such course of the George Law, blew two whistles to her, in the usual manner, and at the proper distance off,

as a signal for her to starboard her helm, and pass the Arrowsmith on her starboard hand, and that the pilot of the Arrowsmith put her helm to starboard. The answer says, that such two whistles were blown by the Arrowsmith when the George Law was a quarter of a mile off from her, and omits the statement that the pilot of the Arrowsmith put her helm to starboard. Both of the pleadings allege that, at the time of the blowing of such two whistles, there was, off the port bow of the Arrowsmith, straightening up the river, and not very far from the course of the Arrowsmith, one of the Hunter's Point ferry-boats, bound to Hunter's Point, which had just come out from the bulkhead at the foot of James street, New York, and to the port side of the Hunter's Point ferry-boat, was a ferry-boat, the Superior, bound down the river, whilst, between the starboard side of the Arrowsmith and the Brooklyn shore, there was no obstruction, but a clear river. The answer then contains an allegation not found in the libel, namely, that the course of the George Law was such at the time the pilot of the Arrowsmith blew his two whistles, that she was attempting to cross, but would have been unable to cross, the bows of the Arrowsmith and the bows of the Hunter's Point ferry-boat, and that the Arrowsmith had slowed for the Hunter's Point ferry-boat just before blowing her two whistles, and that it was impossible for the Arrowsmith to have ported her helm, and to have gone to her own starboard in time to have avoided the George Law, but that the George Law could very readily have gone in the direction called for by the two whistles of the pilot of the Arrowsmith, as the river, in that direction, was free of vessels, and the tide was favorable. Both of the pleadings allege that the whistles so blown by the pilot of the Arrowsmith were clear and distinct. The libel alleges that they were given at such a distance off from the George Law, that they could have been readily heard by those on her, if

they had had a proper lookout stationed, and been attentive to their business. The answer alleges, that the whistles could have been readily heard by those on the George Law, if they had had a proper lookout stationed, and been attentive to their business. Both of the pleadings allege that those on the George Law did not answer in time the signals of the pilot of the Arrowsmith, as they ought to have done. The libel alleges, that the George Law persisted in her aforesaid course. The answer alleges, that she persisted in her aforesaid course, across the bows of both the Arrowsmith and the Hunter's Point ferry-boat. The libel alleges, that the pilot of the Arrowsmith immediately rang his engine bells to slow, stop, and back the Arrowsmith. The answer alleges, that the pilot of the Arrowsmith immediately rang his engine bells to stop and back the Arrowsmith, she being then slowed. Both of the pleadings allege, that these bells were answered by the engineer, and that the Arrowsmith's headway was forthwith checked, so that she was, at the time of the collision, very nearly, if not quite, dead in the water. The libel alleges, that the George Law did not slow, nor stop her headway. The answer alleges, that the George Law did not stop her headway. Both of the pleadings allege, that the George Law continued on the course she was on when the pilot of the Arrowsmith first observed her, and contrary to the signals given by the pilot of the Arrowsmith, until the George Law was about from sixty to one hundred feet off from the Arrowsmith, when the pilot of the George Law blew two whistles, in answer to the two whistles of the pilot of the Arrowsmith, and did not stop her engine. The answer adds, that the two whistles blown by the George Law were blown more than two minutes after the two whistles blown by the Arrowsmith were blown. The libel alleges, that the pilot of the Arrowsmith could not have avoided the collision in any way, as he could not port his helm, without

going contrary to the signals previously given, and without attempting to cross the bows of the George Law. The answer alleges, that the pilot of the Arrowsmith could not have avoided the collision, before giving said two whistles, in any way, as she could not port her helm without going across the bows of the George Law. Both of the pleadings allege, that the Arrowsmith could not put her helm any more to starboard than she had put it, after blowing her two whistles, without being in danger of running into the Hunter's Point ferry-boat, (which bore, the libel says, off the Arrowsmith's port bow, and, the answer says, off the Arrowsmith's port side,) but that it was in the power of the pilot of the George Law to have avoided the collision, and the collision was the result of the incompetence, recklessness, and negligence of the pilot and those in charge of the George Law, in this: (1.) They did not have a competent and skilful pilot in charge of the George Law, but, on the contrary, he was very much agitated at and just previous to the collision, and seemed to have lost his presence of mind, and to have, from want of a proper lookout, just discovered the Arrowsmith ahead of him at the time he blew his two whistles; (2.) He had no proper or sufficient lookouts set; (3.) He did not heed or follow the signal by whistles, given to him in time by the pilot of the Arrowsmith; (4.) He did not check the headway of his boat in proper time; (5.) He did not, in time, put his helm to starboard, by which he could have avoided the collision. The answer adds: (6.) He should have taken an entirely different course in time.

The principal variations between the libel by the Arrowsmith and the answer by her are these: (1.) The statement added in the answer, that the pilot of the Arrowsmith first observed the George Law when the latter was more than a quarter of a mile off; (2.) The statement in the answer, that the two whistles blown by the Arrowsmith were blown when she was a quarter of a

mile off from the George Law, the libel stating that such two whistles were blown at the proper distance off; (3.) The omission in the answer of the statement contained in the libel, after the allegation that the Arrowsmith blew her two whistles, that her helm was put to starboard; (4.) The statement added in the answer, that the course of the George Law was such, at the time the two whistles were blown by the Arrowsmith, that she was attempting to cross, but would have been unable to cross, the bows of the Arrowsmith, and the bows of the Hunter's Point ferry-boat, and that the Arrowsmith had slowed for the Hunter's Point ferry-boat just before blowing her two whistles, and that it was impossible for the Arrowsmith to have ported her helm, and to have gone to her own starboard, in time to have avoided the George Law, but that the George Law could very readily have gone in the direction called for by the two whistles of the Arrowsmith; (5.) The statement added in the answer, that, during the time between the blowing of the two whistles by the Arrowsmith, and the ringing of her engine bells, the George Law persisted in a a course across the bows of both the Arrowsmith and the Hunter's Point ferry-boat, the only statement in the libel as to the course of the George Law at any time being, that it was at all times down the East river, diagonal, but nearly head on to the Arrowsmith; (6.) The statement added in the answer, that the pilot of the Arrowsmith, when he observed that his signal was not answered by the George Law, and that the latter persisted in her course, rang his engine bells to stop and back the Arrowsmith, she being then slowed, the averment in the libel being, that he, at that time, rang his engine bells to slow, stop, and back his vessel; (7.) The statement added in the answer, that the two whistles blown by the George Law were blown more than two minutes after the two whistles blown by the Arrowsmith were blown; (8.) The statement added in the answer, that the Arrow-

smith could not have avoided the collision, before giving her two whistles, as she could not port her helm without going across the bows of the George Law, there being no averment in the libel as to any inability of the Arrowsmith to avoid the collision, or port her helm, before giving her two whistles, and the averment in the libel as to the inability of the Arrowsmith to port her helm being an averment that she could not do so without going contrary to the signal previously given. The most material of these variations are, that regarding the distances between the two vessels when the George Law was first observed from the Arrowsmith, and when the two whistles were blown by the Arrowsmith; that regarding the course of the George Law, when the two whistles were blown by the Arrowsmith, and afterwards, down to the time when the two whistles were blown by the George Law; that regarding the time when the Arrowsmith was slowed; that regarding the interval that elapsed between the blowing of the two whistles by the Arrowsmith and the blowing of the two whistles by the George Law; and that regarding the inability of the Arrowsmith to port her helm, before giving her two whistles.

The libel and the answer by the George Law were both of them filed on the 28th of May, 1868. Her story in them is, that the George Law had reached a point, the libel says about one half, and the answer says about one third, of the way from the New York shore, and was heading diagonally, the libel says down and across the river, and the answer says across the river, when the Arrowsmith, the libel says at a distance off of about three lengths, and the answer does not state at what distance off, blew two whistles. The libel says, that the Arrowsmith commenced sheering towards the New York side before she blew. The answer says that she began to sheer as soon as she blew. Both of the pleadings state that the George Law, after seeing such sheer and hearing such two whistles, blew two whistles herself, and

put her helm to starboard and stopped and backed, and that the Arrowsmith then blew one whistle. The answer states that the Arrowsmith did not stop or slow until the collision. Both of the pleadings state that the collision was occasioned by the fault of the Arrowsmith in these particulars: (1.) In not having a look-out; (2.) In not porting; (3.) In not stopping and backing in time; (4.) In starboarding without waiting for a response from the George Law.

The starboard side of the Arrowsmith at a point about twenty feet aft of her stem was struck by the bluff of the starboard bow of the George Law. The Arrowsmith claims $6,000 damages and the George Law claims $1,000.

It cannot fail to arrest attention, that the libel filed by the Arrowsmith states, that, when on her course up the middle of the river, her pilot observed the George Law off the starboard bow of the Arrowsmith, approaching down the river, on a diagonal course, but nearly head on to the Arrowsmith, and that it was the persistence of the George Law in such course, after the two whistles were blown by the Arrowsmith, and which course it is not alleged she changed before such two whistles were blown, that induced the pilot of the Arrowsmith to ring his engine bells to slow, stop and back. The only course stated in that libel as the course of the George Law at any time is a course down the river, and, though diagonal, nearly head on to the Arrowsmith. The answer filed by the Arrowsmith wholly departs from this statement as to the course of the George Law. Although that answer states, that the course of the George Law, when she was first observed by the pilot of the Arrowsmith, was down the East river, and, though diagonal, nearly head on to the Arrowsmith, and although it then goes on to state, that the blowing of the two whistles by the Arrowsmith was the result of the observation by her of such course of the George Law, yet it afterwards adds,

what is not found in the libel filed by the Arrowsmith, that, when the two whistles were blown by the Arrowsmith, the course of the George Law was such that she was attempting to cross the bows of the Arrowsmith and the bows of the Hunter's Point ferry boat, and that, after such two whistles were blown, the George Law persisted in her course across the bows of both the Arrowsmith and the Hunter's Point ferry boat, and that it was such persistence of the George Law in such course that induced the pilot of the Arrowsmith to ring his engine bells to stop and back. The testimony on the part of the Arrowsmith sustains the allegations of the libel filed by her, as to the course of the George Law, and does not sustain the allegations of the answer filed by her as to such course. Smith, the pilot of the Arrowsmith, testifies, that, when he first saw the George Law, she was very nearly head on to him, a little diagonally possibly, on his starboard bow a trifle, coming nearly at him, but not exactly at him; that she was not heading directly down but a trifle across the river; and that, if she had kept on the course she was then on, and the Arrowsmith had kept on the course she was then on, they would have hit each other. He fortifies this by saying, that, when the two whistles were blown by him, he said to his wheelsman: "If he keeps on that course he will certainly hit us;" and that, when the bells of the Arrowsmith were rung to back, the George Law was on the same course she had been on. On cross-examination, he says, that when he first saw the George Law she was heading as nearly at him as he could get at it; that, from the time the two whistles were blown by the Arrowsmith, to the time of the collision, the George Law did not sheer either way, but came as straight as she could come. Jarvis, the wheelsman of the Arrowsmith, who was in her pilot house with Smith, the pilot, testifies, that, after the George Law got headed down the river, she was coming at the Arrowsmith all the time

Merritt, a passenger on the Arrowsmith, accustomed to navigation by having followed the water, testifies, that, when the two whistles were blown by the Arrowsmith, the George Law was heading a little on the starboard bow of the Arrowsmith, nearly ahead of her; that, if neither vessel had altered her course, they would have come together; and that the George Law would have struck the starboard bow of the Arrowsmith. Tibbits, a passenger on the Arrowsmith, testifies, that he saw the George Law as soon as the two whistles of the Arrowsmith were blown; that she then seemed to be coming right at the Arrowsmith; that the two boats then seemed to him to be directly head and head, and to be in the same line; and that he noticed that the George Law did not change her course. Germain, an engineer, who has followed the water for many years and who was a passenger on the Arrowsmith, testifies, that he first noticed the George Law after the two whistles of the Arrowsmith were blown; that, at that time, the two vessels were on parallel lines; that, running on those lines, they would have come in contact; and that each would have been struck on the starboard side. This testimony on the part of the Arrowsmith, taken in connection with her pleadings, establishes, that she and the George Law were meeting end on, or nearly end on, so as to involve risk of collision, prior to and at the time the two whistles were blown by the Arrowsmith, and so as to make it incumbent on both of the vessels, under the requirement of article 13 of the Act of April 29th, 1864, (13 *U. S. Stat. at Large*, 60,) to put their helms to port, so that each should pass on the port side of the other. In the case of *The Nichols*, (7 *Wallace*, 656, 663,) the Supreme Court says: "Each vessel was seen from the deck of the other about the same time, when they were some two or three miles apart, and, as they were approaching each other from nearly opposite directions, it is quite clear, under the regulations enacted by Congress, that the helms of

both should have been put to port, so that each might have passed on the port side of the other, unless the distance between them at that precise time, was so great as not to involve risk of collision. Rules of navigation are obligatory upon vessels approaching each other, from the time the necessity for precaution begins, and continue to be applicable as the vessels advance, so long as the means and opportunity to avoid the danger remains." Vessels are meeting end on, within the meaning of article 13, when they are approaching each other from opposite directions, or on such parallel lines as involve risk of collision on account of their proximity, and when the vessels have advanced so near to each other that the necessity for precaution to prevent such a disaster begins; and they are meeting nearly end on, within the meaning of that article, when they are approaching from nearly opposite directions, or on lines of approach substantially parallel, and are so near to each other as to involve risk of collision. (*The Nichols, above cited.*) Under the requirement of article 13, it was plainly the duty of the Arrowsmith to have put her helm to port, on the case made in the libel filed by her and by the testimony on her part, that has been referred to.

If, as the answer filed by the Arrowsmith sets up, the George Law, at the time the two whistles of the Arrowsmith were blown, was on a course across the bows of both the Arrowsmith and the Hunter's Point ferry boat, she must have been on the starboard side of the Arrowsmith, and the Arrowsmith must have been on the port side of the George Law. Under such circumstances, article 14 of the Act of April 29th, 1864, made it the duty of the Arrowsmith to keep out of the way of the George Law, and article 18 of the same Act made it the duty of the George Law to keep her course. Such duty was not properly discharged by the starboarding of the Arrowsmith or by the blowing of her two whistles, but the performance of it required that the Arrowsmith should,

under article 16 of the said Act, have stopped and reversed either with or without porting, at a period anterior to the time when she blew her two whistles. In any event, the course pursued by the Arrowsmith was faulty. She should either have ported, or she should have stopped and reversed before she did. Instead of porting she starboarded, and, instead of stopping and reversing, at least as soon as she blew her two whistles, she blew those whistles, and waited for a response, and, receiving none, then stopped and reversed.

The 1st section of the Act of the legislature of New York, passed April 12th, 1848, (*Laws of* 1848, *chap.* 321,) which requires all the steamboats passing up and down the East river, between the Battery at the southern extremity of the city of New York and Blackwell's Island, to be navigated as near as possible in the centre of the river, except in going into or out of the usual berth or landing place of such steamboat, is invoked to show that the Arrowsmith had a right to keep on a course as nearly as possible in the centre of the river. But the Act was no more applicable to the Arrowsmith than it was to the George Law. (*The E. C. Scranton*, 3 *Blatchf. C. C. R.* 50.) Each was bound to navigate as nearly as possible in the centre of the river. The Act was not passed to promote collisions, but to prevent them. It was passed to prevent steamboats from navigating the East river close to the ends of the slips or piers. It must have a reasonable construction, and it cannot authorize any vessel to adhere blindly to a course in the centre of the river, without reference to other vessels. So construed, no two vessels could meet while navigating the East river, without colliding.

It is urged, on the part of the Arrowsmith, that there was not room for the George Law to go between the Arrowsmith and the Hunter's Point ferry-boat, which was where the pilot of the George Law was intending to carry his boat before the Arrowsmith starboarded or

blew her two whistles; that the George Law had abundance of room to go, by starboarding, towards the Brooklyn shore; and that, therefore, the Arrowsmith was right in starboarding. It is also urged that, even if the Arrowsmith had ported instead of starboarding, there would not have been room for the George Law to go between the Arrowsmith and the Hunter's Point boat; and that the consequence of the porting of the Arrowsmith would have been, even if she had escaped colliding herself with the George Law, to throw the George Law against the Hunter's Point boat. These views are urged to excuse the Arrowsmith for not having ported. The ground taken is, that, under Article 19 of the Act of 1864, which provides that, in obeying and construing the rules prescribed by the Act, due regard must be had to all dangers of navigation, and due regard must also be had to any special circumstances which may exist in any particular case, rendering a departure from the said rules necessary, in order to avoid immediate danger, the Arrowsmith was bound to regard the danger to the navigation of the George Law and of the Hunter's Point boat which would have ensued from the porting of the George Law. The answer to these views is, that the Arrowsmith ought to have stopped and reversed, at least as soon as she blew her two whistles, and ought at the same time to have thrown her head to starboard. She would then have been free from fault. She saw that there was risk of a collision with the George Law, and, therefore, blew two whistles. It was because of the approach of the George Law, involving such risk, that the two whistles of the Arrowsmith were blown. Having starboarded, either then or previously, without waiting to know whether the George Law would starboard also, it became necessary that the Arrowsmith should stop and reverse at least as soon as she blew her two whistles. It being necessary that she should do so then, it was incumbent on her, by Article 16 of the Act, to do so then. If she had done so

then, and her head had been then thrown to starboard, she would have been free from fault, and there would have been no occasion for any indulgence in conjecture as to whether she would or would not, by so doing, have collided with the George Law, or as to whether the Hunter's Point boat would not, or would in that event, have collided with the George Law. The tide was strongly ebb, which would have favored both the stopping of the headway of the Arrowsmith, as she was going against it, and the turning of her head to the starboard by porting. It is true that the Arrowsmith was nearly, if not quite, dead in the water, at the time the two vessels struck each other. But that does not meet the difficulty. If she had stopped and reversed sooner, she would have become dead in the water at a greater distance from the George Law, and her speed would have been retarded thereby, and by the action of the tide, so much sooner than it was, that the collision would probably have been entirely avoided or been very slight. Her libel and her answer allege, that she could not put her helm any more to starboard than she did put it after blowing her two whistles, without being in danger of running into the Hunter's Point ferry-boat, which bore, the libel says, off her port bow, and, the answer says, off her port side. Her pleadings no where allege, that, if she had stopped and reversed sooner, so as to have fallen behind the Hunter's Point boat, she could not, before her two whistles were blown, have starboarded to a greater extent than she did, without being in danger of running into the Hunter's Point boat, and to a sufficiently greater extent to have cleared the George Law. There would not have been, within the 19th Article of the Act, any danger of navigation incurred by the Arrowsmith by stopping and reversing sooner than she did, or by porting, as, on the evidence, there was no obstruction behind her or to her starboard side; and no special circumstances, within such 19th Article,

are shown to have existed, rendering a departure by the Arrowsmith from the 13th and 16th Articles necessary, in order to avoid immediate danger. On the contrary, all the danger of navigation incurred by the Arrowsmith was incurred by her not stopping and reversing sooner than she did, and by her not porting; and the evidence shows that an adherence by her to the 13th and 16th Articles was necessary in order to avoid immediate danger. My conclusion, therefore, is, that the handling of the Arrowsmith contributed to the collision and that she was in fault.

The George Law was also in fault for violating the provision of the 1st section of the Act of the legislature of New York of April 12th, 1848, (before cited,) which enacts, that steamboats passing up and down the East river between the Battery at the southern extremity of the city of New York and Blackwell's Island shall not be propelled at a greater rate of speed than ten miles an hour. By the testimony of the pilot of the George Law, she was going, from the time she got on her course down the river until her bells were rung to slow, stop and back, at a speed of eleven knots an hour with the tide. But, independently of the statutory provision, the George Law maintained too great a rate of speed under the circumstances. She was aiming to go through the contracted space between the Arrowsmith and the Hunter's Point boat, and was going with the tide, which was strong and nearly half ebb, and her success in doing so depended upon her being allowed to do so by the Arrowsmith. The pilot of the George Law says that, up to the time the four bells of the George Law were rung to slow, stop and back, which was done at a distance of 275 yards from the Arrowsmith, the George Law was heading about two points to the New York side of the line of the channel up and down, leaving the line of the channel about two points on his port bow; and that the Arrowsmith, up to the time she was 300 yards off

from the George Law, was heading at the George Law, bearing two points on the port bow of the George Law, and heading two points on the port bow of the George Law. Under these circumstances, although the pilot of the George Law may have thought that the Arrowsmith would keep to the right, yet the George Law was approaching the Arrowsmith in such manner as to involve risk of collision, and to make it incumbent upon the George Law under Article 16 of the Act of 1864, to slacken her speed sooner than she did, and not to plunge on at the rate of eleven knots an hour until within 275 yards of the Arrowsmith. The neglect to slacken her speed sooner than she did was, also, on the part of the George Law, a neglect, under Article 20 of the Act, of a precaution required by the special circumstances of the case.

There must, therefore, be a decree apportioning between the two vessels the damages sustained by them both, with a reference to ascertain such damages. The question of costs is reserved until the coming in of the report of the Commissioner.

B. D. Silliman and *D. McMahon*, for the Arrowsmith.

Beebe, *Donohue* and *Cooke*, for the George Law.

NOVEMBER, 1869.

THE STEAMSHIP RUSSIA.

COLLISION IN NEW YORK HARBOR.—VESSEL AT ANCHOR.—INEVITABLE ACCIDENT.—HARBOR REGULATIONS.—JURISDICTION.—SUITS BETWEEN FOREIGNERS.

A British steamship, coming into the harbor of New York, was swung by the ebb tide, which forms a rip where the tides from the North and East rivers meet, against an Austrian ship, lying at anchor, and sank her. The ship had come in

from sea the day before, and had anchored where she was sunk, and no notice to remove from that anchorage had been given to her by the harbor masters:

Held, That the Court of Admiralty was not called upon, by the fact that all parties concerned were foreigners, to decline, from motives of international comity, to exercise jurisdiction in the case;

That the effect of the tide upon the steamer was not an inevitable accident;

That, the ship being anchored in a customary place, and where no State law or city ordinance forbade anchoring, any general regulation of the harbor masters, forbidding her to anchor there, must be held to have been waived in her behalf, by the failure to give her notice to remove;

That, the ship having come in from sea in a seaworthy condition, the fact that she was sunk by the blow of the steamship did not establish that she was not "tight and strong"

BLATCHFORD, J. This is a libel filed by Ambrozio Ralli, the owner of the Austrian ship Figlia Maggiore, against the British steamship Russia, to recover for the damages caused to the Figlia Maggiore and her cargo, by a collision between her and the Russia, which took place in the harbor of New York, off the Battery, on the 25th of May, 1869, about 11 o'clock, A. M. The Figlia Maggiore arrived in port the day previous, from Marseilles, with a valuable cargo, and came to anchor off the Battery, at a place designated by her pilot, and was at anchor at the same place, at the time of the collision. The Russia was coming in from sea, on a voyage from Liverpool, and was bound to her wharf at Jersey City. The libel alleges, that the Figlia Maggiore was anchored from three hundred to four hundred yards distant from the Battery, and at a place usual and customary for vessels to anchor. The tide was ebb, and the weather was clear. The Figlia Maggiore's stern was tailing down towards the direction from which the Russia was approaching. The stem of the Russia struck the port side of the Figlia Maggiore between the main and mizzen rigging, angling somewhat forward, and crushed her in, so that she sank to the bottom in less than ten minutes, with all the property on board of her. The libellant, as carrier of the cargo on board, having possession of it at the time it was sunk, claims to recover in this suit for

the damage to it, as well as for the damage to the vessel and her appurtenances, and for loss of freight, if any.

The defence set up in the answer, to show no fault in the navigation of the Russia, is, that, owing to the crowded state of the middle and west side of the North river, the Russia was compelled to go over towards the Battery; that, when she was within a sufficient distance of the Figlia Maggiore, her helm was starboarded, so as to cause her to pass on the port side of the Figlia Maggiore, but that, owing to an eddy which the tide made in that place, she did not mind her helm; that her engines were reversed, and her headway had been nearly stopped, when the collision happened; that, at the place where the accident occurred, the tide makes eddies, which are very irregular in their position, direction, and strength; and that it is impossible to foresee when and in what manner they will affect the course of a vessel getting into them. The case is thus sought to be made, on the part of the Russia, one of inevitable accident; and, to attempt to sustain such a view, testimony was put in, on the part of the Russia, as to the action of the tides from the North and East rivers at their junction. Griffiths, a Sandy Hook pilot, testifies, that the ebb tide begins to run out of the East river about an hour and a half before it begins to run out of the North river; that, at about half tide, or about three hours ebb, which was the state of the tide at the time of the collision, it ordinarily runs out of the East river at the rate of about two knots and a half per hour; that, at that time, it runs out of the North river at the rate of about one knot and a half per hour; that, at that time, the two tides meet on a line drawn from the flag-staff at the Battery to Bedlow's Island, the direction of the line being southwest by south; that, as the tide from the East river runs about west-southwest, and that from the North river runs about south, and against it, a regular bulkhead is formed, and a very large ripple is made; that a vessel, on strik-

ing it, is generally slewed around by it to the eastward or the westward, dependent upon how she strikes it; that, at the first of the ebb, the line of the tide-rip is up towards Castle Garden; that, as the North river tide comes down, such line is forced down across the mouth of the East river, until, at half tide, it runs about southwest by south, as before stated; that a vessel striking into that tide-rip will not mind her helm until she gets a length into it; and that the pilots generally try to keep out of such tide-rip. On cross-examination, he testifies, that the rip is easily seen, and that it is risky getting into it. This testimony is confirmed by Van Pelt and Bloodgood, witnesses for the claimants, the former a Sandy Hook pilot, and the latter the master of a steam tug. The latter also says, that if a vessel, having slight way on her, runs heading up the North river, across the mouth of the East river, at the stage of ebb tide referred to, her head will turn to the starboard exactly with the tide from the East river. This testimony condemns the Russia, instead of excusing her. In attempting to enter such a tide-rip, with a vessel at anchor, as the Figlia Maggiore was, on her starboard hand, and near her course, she assumed all the risk of avoiding such vessel. The tide-rip was plainly to be seen, and its course, and character, and action upon a vessel entering it were not fortuitous, or varying, or uncertain, but were, on the evidence, things to be foreseen, and, therefore, to be guarded against. To enter such a tide-rip, was to take, in respect to vessels at anchor ahead, all the risks of so navigating through it as not to collide with such vessels. She entered it at an angle, so that, as the tide from the North river struck her on her port bow, the tide from the East river acted on her starboard side, and the effect was to sheer her head to starboard, although her helm was starboarded, and, with the way she had on, to shoot her, stem on, off to starboard, against the Figlia Maggiore.

There is nothing to show that the Figlia Maggiore was anchored in an improper place. On the evidence, she was anchored in a customary place of anchorage, and in a place not forbidden by any State law or city ordinance. As to any general regulation made by the harbor masters, it is not shown that those charged with the anchorage or management of the Figlia Maggiore were notified of any such regulation, or had been warned not to allow their vessel to remain where she was. As she had taken her anchorage in a place not shown to have been in itself unsafe or improper, as respected the navigation of other vessels, a failure on the part of the proper harbor master to notify her to remove from such anchorage must be regarded as a waiver, in her favor, of at least any general regulation, of which she was not, in fact, notified, which forbade her anchoring at the place where she was anchored.

Of the various other defences set up in the answer, none are made out. Those on board of the Figlia Maggiore did not neglect to take any measures which it is shown they could have taken to prevent or avoid the collision or its consequences. The allegation, in the answer, that the Figlia Maggiore would not have received the damage actually sustained, if she had been tight and strong, is not true in the sense stated, nor is it any defence in that sense. She had just come in, in fair seaworthy condition, from a long voyage; and she was entitled, in law, to have the navigation of the Russia, in respect to her, regulated by some other standard than her capacity to successfully resist, at anchor, a blow from the Russia in motion. (*Amoskeag Mfg. Co.* v. *The John Adams*, 1 *Clifford's R.*, 404, 418, 419.)

The service on the claimants of the attachment issued against the libellant by the State Court after this suit was brought, can in no manner affect this suit *in rem* against the Russia.

One more point, raised in the answer, remains to be

noticed. It is, that, as both of the vessels are foreign vessels, not owned by citizens of the United States, this Court ought not to entertain jurisdiction of the cause of action set forth in the libel. It is not maintained that this Court is without jurisdiction of this suit, but it is urged that it ought not to busy itself with deciding a controversy between foreign vessels and foreigners. This case being one of a collision on navigable waters in the harbor of New York, is a civil case of admiralty and maritime jurisdiction; and, therefore, within the cognizance of this Court, by virtue of the 9th section of the Judiciary Act of September 24th, 1789, (1 *U. S. Stat. at Large*, 77,) the Russia having been attached within the territorial jurisdiction of this Court. (*The Propeller Commerce*, 1 *Black*, 574; *The Belfast*, 7 *Wallace*, 624, 637 *to* 642.) The ground urged why this Court should not exercise jurisdiction in this case is, that, although it may have power to hear and determine this suit, it will regard the circumstances of the case as rendering it unfit that it should hear and determine it, because the libellant and the claimants are not citizens of the United States and the colliding vessels are both of them foreign vessels. It is supposed that the Court ought, from motives of international comity, delicacy and convenience, to decline the suit, and it is maintained that justice does not require this Court to interpose in favor of the foreign libellants. Although, on these principles, the Court of Admiralty forbears, as a general usage, to exercise its jurisdiction over controversies between foreign seamen and shipmasters (*The Napoleon, Olcott's R.*, 208, 215,) and over suits brought by foreign seamen against masters or owners, being also foreigners, or against foreign vessels, (*Davis* v. *Leslie*, 1 *Abbott's Adm. R.*, 123, 134; *Bucker* v. *Klorgeter*, *Id.*, 402, 405,) yet the principle upon which such Court proceeds in determining, in any case, whether to exercise such jurisdiction or not, is to inquire whether the rights of the parties will best be promoted by retain-

ing and disposing of the case or by remitting it to a foreign tribunal. (*One hundred and ninety-four shawls*, 1 *Abbott's Adm. R.*, 317, 323 *to* 326.) I am not aware that jurisdiction, in a case of collision, has ever been declined by any Court of Admiralty, either in the United States or in Great Britain, because the two colliding vessels were the property of foreign subjects. In the case of *The Johana Friederich*, (1 *W. Rob.*, 35, 37,) which was a case *in rem* prosecuted in the High Court of Admiralty in England, on a collision on the high seas, between Dover and Dungeness, between a Danish vessel and a Bremen vessel, whereby the Danish vessel, with a cargo on board belonging to British subjects, was sunk and totally lost, Dr. Lushington said: "It has also been said, in the course of the argument, that this Court is not desirous of exercising its jurisdiction between foreigners; and, in support of this doctrine, some observations of Lord Stowell, in cases of seamen's wages, have been cited. But it appears to me that the cases cited are distinguishable from the present for the following reason—that all questions of collision are questions *communis juris*, but, in cases of mariners' wages, whoever engages voluntarily to serve on board a foreign ship, necessarily undertakes to be bound by the law of the country to which such ship belongs, and the legality of the claim must be tried by such law. One of the most important distinctions, therefore, respecting cases where both parties are foreigners, is, whether the case be *communis juris* or not." Again, he said, (*page* 38): "If these parties must wait until the vessel that has done the injury returned to its own country, their remedy might be altogether lost, for she might never return at all; and, if she did return, there is no part of the world so distant to which they might not be sent for their redress. * * * From these considerations it is perfectly clear, that a refusal to exercise the jurisdiction of the Court in these cases would, in effect, amount to a total denial of justice." In conclusion,

the Judge stated the following to be the grounds on which he exercised jurisdiction in the case: "1st. That all causes of collision are causes *communis juris*; 2dly. That the vessel, at the time of her arrest, was within Admiralty jurisdiction; 3dly. That the collision took place upon the high seas close upon the English coast." He added: "If it had been necessary, I could have cited several authorities in support of the general jurisdiction of the Court. But I decide the question on the grounds I have stated, without taking into my consideration the circumstance that was adverted to in argument, that the cargo on board was the property of British subjects. This fact is undoubtedly of considerable importance, inasmuch as I am at a loss to conceive how I could refuse jurisdiction, and send the British owners to a foreign country; and, what an anomaly would occur, if, in a transitory action, I could do justice to one set of owners, and refuse it to another." In the case of *The Griefswald*, (1 *Swabey*, 430, 435,) Dr. Lushington says: "In cases of collision, it has been the practice of this country, and, so far as I know, of the European states and of the United States of America, to allow a party alleging grievance by a collision, to proceed *in rem* against the ship wherever found."

In the present case, no reasons exist why this Court should decline jurisdiction. The case is one of collision. The Russia has been arrested within the jurisdiction of this Court. The collision took place in the harbor of New York. Several of the witnesses on both sides belong in New York, and were not on board of either vessel. There is no special question arising under the local laws either of Great Britain or of Austria to be determined in this case. These considerations, independently of the fact stated on the trial, that some of the cargo of the Figlia Maggiore belonged to citizens of the United States—a fact which is, however, not averred in the libel or shown by proof—induce the Court to regard this case as one in

which it is eminently proper and conducive to justice that it should exercise the jurisdiction invoked by the libellant.

There must, therefore, be a decree for the libellant, with costs. The reference to ascertain the damages will include damage to the cargo as well as to the vessel, the former being claimed in the libel to be recovered by the libellant, as carrier in possession at the time the damage was done. (*The Propeller Commerce*, 1 *Black*, 574, 582; *The Commander in Chief*, 1 *Wallace*, 50 *to* 52.)

C. Donohue and *T. Scudder*, for the libellants.

D. D. Lord, for the claimants.

NOVEMBER, 1869.

WILLIAM L. GRACE *v.* JOSEPH EVANS.

ARREST IN ADMIRALTY.—BAIL.—ATTACHMENT.

The proper form of stipulation to be given for the discharge of a party arrested in a suit in Admiralty, is for the appearance of the party to abide by the decree of the Court in the cause, and not for the payment of the sum decreed.

Where a warrant of arrest was issued, with a clause directing the marshal, if the respondent could not be found, to attach his property, and the marshal returned that he had arrested the respondent, and had attached his property:

Held, That the attachment must be set aside.

IN this case, a libel was filed, alleging that the defendant, a master of a vessel, had sold cargo on board her belonging to the libellant, and had brought the proceeds to this port, and had refused to pay them over to libellant. On this, an order was made that the respondent be arrested and held to bail. A warrant was accordingly issued against him, with a clause providing that, if

he was not found, the marshal was to attach his property or credits and effects. The marshal returned that he had arrested the respondent, and had also attached his credits and effects. The respondent thereupon tendered a stipulation, with sufficient surety, conditioned that the respondent should appear in Court, to abide by the decree of theCourt in the cause. Objection was taken, on behalf of the libellant, that the stipulation ought to be, that the respondent should pay the amount decreed against him. The respondent also claimed that the attachment should be set aside, on the ground that the process only directed the service of the attachment, in case the respondent could not be found, and that, inasmuch as the marshal had arrested the respondent, and held him in custody, he had no authority to attach his property.

The Court, (BLATCHFORD, J.,) held, that the libellant had no right to any further security than that which was offered by the respondent; and, on the filing of the stipulation offered, ordered the arrest and the attachment to be discharged.

For libellant, *T. Scudder*.

For respondent, *C. Van Santvoord* and *R. D. Benedict*.

In the Matter of Charles McBrien, a Bankrupt.

NOVEMBER. 1869.

IN THE MATTER OF CHARLES McBRIEN, A BANKRUPT.

EXAMINATION OF BANKRUPT.—PROPERTY IN HIS POSSESSION AFTER THE FILING OF HIS PETITION.

Questions put to a bankrupt by the assignee in bankruptcy, tending to show that, within a short time after the filing of his petition, he had an amount of money in his possession, which he had not acquired by the transaction of any business subsequent to such filing, are proper.

THE petition in bankruptcy, in this case, was filed on the 11th of March, 1868. In November, 1869, the bankrupt being under examination, the following questions were propounded to him by the assignee:

When did you first do any business, if at all, after filing your petition?

Have you done any business since you filed your petition?

Before going into business, after filing your petition, were you in the possession of any money?

Have you had any place of business since filing your petition?

Since filing your petition, have there been kept any books of account of your business?

Since filing your petition, have you kept, in your own name, or otherwise, any bank account?

In the month of April, 1868, were you not in the possession of, or control of, some hundreds of dollars in money?

Since filing your petition, have you not made deposit of some thousands of dollars of money?

The bankrupt refused to answer any of the questions,

claiming that he was not bound to answer any questions as to the possession of property, or the carrying on of business, by him, subsequent to the filing of the petition.

The register certified the questions to the Court, with his opinion that the questions were proper.

BLATCHFORD, J. The questions were proper and relevant, and must be answered.

NOVEMBER, 1869.

IN THE MATTER OF JOHN DAVIS, AGAINST WHOM A PETITION FOR ADJUDICATION OF BANKRUPTCY HAS BEEN FILED.

INVOLUNTARY BANKRUPTCY.—ARREST ON MESNE PROCESS.—CONSTRUCTION OF STATUTE.—FRAUDULENT SUSPENSION OF PAYMENT OF COMMERCIAL PAPER.

A statute must be so construed, if possible, without doing violence to language, as to give force and meaning and effect to every part of it.

A debtor was arrested on August 24th, 1869, under an order of arrest issued out of the Superior Court of the City of New York, in an action founded on a promissory note for more than $100. He immediately gave bail and was not lodged in jail. The order of arrest remained in force at the time of the filing of a petition in involuntary bankruptcy against him, on September 20th, 1869:

Held, That, as the debtor was not actually imprisoned for more than seven days on the order of arrest, he was not liable to be adjudged a bankrupt, under the 39th section of the bankruptcy Act, by reason of what occurred under the order of arrest.

Proof, that a merchant has suspended payment of commercial paper and has not resumed payment of it within a period of fourteen days, is not sufficient to authorize an adjudication of bankruptcy against him under the 39th section of the Bankruptcy Act. The creditor must show that the stoppage or suspension was fraudulent.

THIS was a hearing on a petition for involuntary

bankruptcy before the Court without a jury. The first act of bankruptcy alleged in the petition, which was sworn to on the 17th of September, 1869, and filed on the 20th of September, 1869, was, that the debtor "has been arrested and held in custody under and by virtue of mesne process issued out of the Superior Court of the city of New York in the State of New York, within which the debtor has property, founded upon a demand in its nature provable against the bankrupt's estate, under said Act, and for a sum exceeding one hundred dollars, and that such process is remaining in force and not discharged by payment, or in any other manner provided by the laws of such State applicable thereto, for the period of seven days." The proof showed, that the debtor was, on the 24th of August, 1869, at the city of New York, in which city he then resided, arrested and held in custody by the sheriff of the city and county of New York, under an order of arrest issued out of the Superior Court of the city of New York; that the debtor, on his arrest, immediately gave bail, and was not lodged in jail, and was discharged from close custody by the sheriff; that the order of arrest was issued in a civil action, founded on a promissory note for a sum exceeding one hundred dollars, made by the debtor, and which was a demand in its nature provable against the bankrupt's estate under the bankruptcy Act; and that the said order of arrest, at the time of making oath to said petition, still remained in force and had not been discharged by payment, or in any other manner provided by the law of the State of New York applicable thereto. The second act of bankruptcy alleged was, that the debtor, "on the 24th day of August, 1869, being a merchant or trader, has fraudently stopped and suspended payment of his commercial paper and has not resumed within a period of fourteen days, to wit, a certain promissory note," specifying its particulars.

In the Matter of John Davis, an Involuntary Bankrupt.

For the creditor, *Hawes* and *Wardell.*

For the debtor, *Morrison*, *Lauterbach* and *Spingarn.*

BLATCHFORD, J. The 39th section of the bankruptcy Act specifies, as an act of bankruptcy, that the debtor "has been arrested and held in custody under or by virtue of mesne process or execution, issued out of any Court of any State, district or territory within which such debtor resides or has property, founded upon a demand in its nature provable against a bankrupt's estate under this Act, and for a sum exceeding one hundred dollars, and such process is remaining in force and not discharged by payment, or in any other manner provided by the law of such State, district or territory applicable thereto, for a period of seven days." The same section, in the clause immediately following the one just cited, specifies, as an act of bankruptcy, that the debtor "has been actually imprisoned for more than seven days, in a civil action, founded on contract, for the sum of one hundred dollars or upward." The order of arrest in this case was issued in a civil action, founded on contract, for a sum exceeding one hundred dollars. It was mesne process issued out of a Court of the State in which the debtor resided, and was founded on a demand in its nature provable against a bankrupt's estate under the Act, and such process remained in force and was not, when the petition was filed, discharged by payment or in any other manner provided by the law of such State applicable thereto. The debtor was arrested under the process, and immediately gave bail, and was not lodged in jail, and was discharged from close custody. Assuming that he was held in custody for a period of seven days under the process, he was not actually imprisoned on it for more than seven days. This case, therefore, does not fall within the second clause cited, although it may fall within the first clause. The question to be

determined is, whether, under those circumstances, he can be adjudged a bankrupt. I think not. The statute evidently intended to draw a distinction between being actually imprisoned for more than seven days, and being held in custody for a period of seven days. It confined the former to a civil action founded on contract, while it extended the latter to an action founded on any demand in its nature provable against a bankrupt's estate. Not only are claims founded on contract provable in bankruptcy, but, by section 19, all demands against the bankrupt for or on account of any goods or chattels wrongfully taken, converted or withheld by him, are provable, as debts, to the amount of the value of the property so taken or withheld, with interest. Such demands are not claims founded on contract. There are, therefore, claims or demands which would fall within the first clause and not within the second clause. The first clause has, therefore, a field for operation over which the second clause does not extend. This being so, and there being a distinction evidently intended by the statute between actual imprisonment, and mere arresting and holding in custody, a person actually imprisoned being held in custody, although a person held in custody is not necessarily actually imprisoned, full effect must be given to the second clause. This cannot be done if it be held that a person arrested in a civil action founded on contract may be adjudged a bankrupt although he has not been actually imprisoned for more than seven days. If it be so held, on the ground that a claim founded on contract is a demand in its nature provable against a bankrupt's estate under the Act, and that it is sufficient, under the first clause, that the debtor be arrested and held in custody under mesne process founded on such demand, for a period of seven days, then no cases exist which would not fall within the first clause, and the second clause would become inoperative and might as well have been left out of the statute. A statute must be so construed,

if possible, without doing violence to language, as to give force and meaning and effect to every part of it. In this case there is no affirmative repugnancy between the two clauses. The only question is, whether it shall be held to be the intention of the legislature that cases falling within the second clause shall be governed wholly by the second clause, although, if the second clause had been omitted from the section, they would fall under the first clause. I think that that is the sound construction to be given. Even if the two clauses were repugnant to each other, in a broader sense than they are, the second clause would control, as being the later expression of the will of the law makers. (*Powers* v. *Barney*, 5 *Blatchf. C. C. R.*, 202.)

I must, therefore, hold that, inasmuch as the debtor was not actually imprisoned for more than seven days on the order of arrest issued against him, he is not liable to be adjudged a bankrupt by reason of any thing alleged in the petition to have occurred under and by virtue of such mesne process.

The 39th section of the Act makes it an act of bankruptcy, that the debtor "being a banker, merchant or trader, has fraudulently stopped or suspended and not resumed payment of his commercial paper, within a period of fourteen days." The evidence shows that the debtor was a merchant or trader doing business in the city of New York; that the promissory note mentioned in the petition was commercial paper, by having been made and delivered by the debtor in the regular course of his business, for goods sold and delivered to him; and that the note had, at the time the petition was filed, remained unpaid for a period exceeding fourteen days. This is not sufficient. Something must be shown from which the Court can draw the conclusion that the stoppage or suspension of payment of the note was fraudulent. The mere non-payment of the note does not warrant such conclusion. It was not intended by the Act

that the mere stoppage or suspension, followed by non-resumption for fourteen days, should throw on the debtor the burden of showing that there was no fraud in the stoppage or suspension. It is for the creditor to show that the stoppage or suspension was fraudulent. That is not shown by showing nothing but stoppage or suspension, continued for fourteen days. There may be many reasons for stoppage falling short of fraud. If the legislature had intended that mere stoppage or suspension without resumption within fourteen days should be an act of bankruptcy, it would have said so plainly. It has unmistakably said that that shall not be an act of bankruptcy, unless the stoppage or suspension is fraudulent. The creditor must, therefore, show the fraud which he has alleged in his petition. As he has failed to do so, from misapprehension, an opportunity will be afforded to him to supply the defect, if he can, by further proof.

NOVEMBER, 1869.

IN THE MATTER OF HENRY S. LESZYNSKY, A BANKRUPT.

STAY OF PROCEEDINGS.—JUDGMENT APPEALED FROM.

A judgment rendered against a bankrupt in a State Court, from which he has appealed before the filing of his petition, is conclusive, as against him, to enable the judgment creditors to prove it as a debt in the bankruptcy proceedings.

Proceedings by the creditors, on such appeal from the judgment, will be stayed, on motion of the bankrupt, pending the bankruptcy proceedings.

THE petition in these proceedings was filed on the 4th of May, 1869. Before that time judgment had been recovered against the bankrupt in the Supreme Court of the State of New York, and he had appealed from such

judgment, giving security on such appeal. On the filing of his petition he obtained an injunction restraining the creditors from proceeding in the matter of the appeal. This injunction they moved to have modified, in order to enable them to determine the amount of their claim against the bankrupt, and to enforce their rights against the sureties. The bankrupt's petition did not admit the claim of the judgment creditors against him, but stated the fact of the recovery of the judgment against him, the appeal and the giving of security on such appeal.

For the motion, *John A. Mapes.*

In opposition, *P. J. Joachimssen.*

BLATCHFORD, J. This motion must be denied. See Metcalf's case (2 *Ben. R.*, 78,) in which decision I concur. The judgment already recovered is conclusive, as against the bankrupt, to enable the creditors to prove it as a debt.

NOVEMBER, 1869.

IN THE MATTER OF JAMES E. BROOME, A BANKRUPT.

TRUST DEED.—CLOUD ON TITLE.

A trust deed of lands in Florida, made by a bankrupt, who remained in possession of the lands till the filing of his petition in bankruptcy, will not be set aside by the bankruptcy Court on petition of the assignee, unless such petition states that the lands were conveyed by the bankrupt in fraud of his creditors under the laws of Florida, or facts showing that they were so conveyed, and, therefore, passed to the assignee under the 14th section of the bankruptcy Act.

IN this case, the assignee in bankruptcy presented a

petition to the Court asking for the cancellation of a trust deed, executed by the bankrupt, of lands in Florida.

For the petition, *John McDonald.*

In opposition, *Alexander & Green.*

BLATCHFORD, J. The petition of the assignee in bankruptcy alleges only, that the trust deed which it sets forth was made, conveying the lands in Florida described in the deed; that it was duly delivered to the grantees and recorded by them; that the conditions on which the trust was to be carried out came into operation, but the trustees did not take possession of the lands or take any step to carry out the trust; that the bankrupt remained in possession of the lands until he filed his petition in bankruptcy; and that the assignee cannot make sale of the lands while the trust deed remains as a cloud on the title. The petition then prays that the trust deed may be set aside and delivered up by the trustees to be cancelled and removed from the records in Florida. There are no allegations to sustain the prayer for relief. The petition does not allege that the lands were conveyed by the bankrupt in fraud of his creditors, nor does it state any facts showing that they were so conveyed, so as to show that the lands passed to the assignee in bankruptcy, as being, within the 14th section of the Act, property "conveyed by the bankrupt in fraud of his creditors." As the property was real estate situated in Florida, it should have been alleged and proved that the conveyance was in fraud of creditors under the laws of Florida.

The petition is dismissed, with costs.

In the Matter of Robert Lathrop and others, Bankrupts.

NOVEMBER, 1869.

IN THE MATTER OF ROBERT LATHROP AND OTHERS, COMPOSING THE FIRM OF LATHROP, CADY & BURTIS, BANKRUPTS.

CHAMPERTY.—COMPROMISING DEBT.—REJECTING PROOF OF DEBT.

M. & C. had filed two proofs of debt against bankrupts, one for $5.95 and a second for $86.61. They presented a petition to the Court, praying for the rejection of proofs of debt filed by another creditor, P., to the amount of $48,663. Thereupon, P. presented a petition, stating that he was the owner of the debt for $86.61, and had proved it himself as a debt, and that the claim for $5.95 had no valid existence, and praying that the claims of M. & C. might be rejected. On this petition, a reference was had before the register, who reported that M. & C. were creditors in the sum of $86.61, and that the claim for $5.95 ought to be disallowed. It appeared that M. & C. had made an agreement with one L., appointing him their agent to collect their debt from the bankrupts at his expense, he to pay them one-fourth of what he should collect. This agreement was claimed by P. to be champertous. It further appeared that M. & C., having a note of the bankrupts for $173.63, had sold it to P. for less than its face; that P., in making such purchase, acted for the bankrupts; that the money with which he bought it was not his own, but proceeds of assets which belonged to the bankrupts when their petition was filed; and that the claim which M. & C. had proved, was for the remainder of the note, beyond the sum they had received from P.:

Held, That the agreement between L. and M. & C. furnished no ground for disallowing the claim of M. & C.;

That M. & C., in dealing with P., supposed they were compromising the note with the bankrupts, and that they could not prove any part of it, or question the right of P. to prove it, and their proofs of debt must be disallowed;

That as, under the 22d section of the bankruptcy Act, the examination as to any proof of debt might be made without any application therefor, and as it appeared from the evidence that certain claims held by P. were not his, because he was acting for the bankrupts in purchasing them, they must be rejected;

That it must be referred to the register to report which claims ought to be rejected on this ground.

BLATCHFORD, J. On the 8th of April, 1869, Augustus M. Morgan and George G. Clark filed a petition in this Court, alleging that they are creditors of the bankrupts

by claims duly proved herein, and praying, on certain facts alleged in said petition, that certain proofs of debt filed herein by one Cyrus D. Prescott and others, to the amount of $48,663, be disallowed and rejected as not due to the claimants thereof. One proof of debt of Morgan and Clark was filed on the 18th of January, 1869, and embraced only one item of claim, being for $5.95. Another proof of debt of Morgan and Clark was filed on the 19th of February, 1869, and embraced only one item of claim, being for $86.61. Before any adjudication on said petition of Morgan and Clark, and on the 12th of April, 1869, a petition was filed in this Court by the said Prescott, alleging that he is a creditor of the bankrupts by claims duly proved herein, to the amount of $54,100.16; that he is the owner of the said claim amounting to $86.61 proved by Morgan and Clark, having purchased it from them before it was so proved, and had proved it himself as a claim herein; and that the alleged claim of $5.95 has no valid existence. The petition prays for an order referring it to a register to investigate the existence and validity of the claims of Morgan and Clark, and that such claims may be rejected and disallowed. On this petition, an order was made by this Court, on the 22d of April, 1869, referring it to Register Dwight, to take proof as to whether Morgan and Clark are creditors or not of the bankrupts, and, if so, in what amount, and to report the same to this Court, with his opinion thereon. In pursuance of this order, the register has reported the testimony taken before him thereunder, and has also reported that, in his opinion, Morgan and Clark are creditors of the bankrupts in the sum of $86.61, besides interest, and that the claim of $5.95 ought to be disallowed, as not an existing debt.

The case has been argued before the Court on the testimony and report, on the question as to whether the report should be confirmed by the Court.

The first point taken on the part of Prescott is, that

the claims of Morgan and Clark ought to be rejected because they are prosecuted under a champertous agreement made between Morgan and Clark and one Paoli Lathrop. The agreement is in evidence. By it, Morgan and Clark appoint Lathrop their agent, to take such proceedings for them, in law or otherwise, to recover from the bankrupts or settle with them for said claims, as he may deem advisable, but all such proceedings are to be at the cost and expense of Lathrop, who is to save Morgan and Clark harmless therefrom ; and, in consideration thereof, Morgan and Clark agree that Lathrop may retain, as compensation for his services, three-quarters of any and all sums he may recover or collect on account of said claims, besides the expenses he may incur in so doing, the remainder to be paid to Morgan and Clark.

Morgan and Clark do not come into Court to enforce against the bankrupts a right of action which owes its existence to this agreement with Lathrop. Their claims against the bankrupts, if valid, exist independently of such agreement. Nor is Lathrop a party to these proceedings, setting up such agreement by way of offensive or defensive action. The agreement is a collateral matter. The claims of Morgan and Clark are not founded on it as a cause of action. Under such circumstances, it has never been held that an agreement made by the creditor with a third party, in reference to the prosecution of a claim, although it would be held to be champertous if either party to it were setting it up as the foundation of a suit or a defence in a Court of justice, can be used to defeat the creditor in establishing a claim otherwise valid. In the case of *Hall* v. *Gird*, (7 *Hill*, 586,) a suit to foreclose a mortgage, was brought, under an agreement made between the plaintiff and her solicitor, by which the latter was to have one third of what should be collected. The chancellor held that this, which was the only defence set up, was no defence whatever, and his decision was affirmed by the Court for the Correction of

Errors. The opinion of that Court was delivered by Mr. Justice Beardsley, who held that the agreement did not invalidate the mortgage or impair the obligation of the mortgagor. He says: "An offer to use a mortgage or any other security valid in its inception, or even its use, for an illegal purpose, is not, at common law, any impediment to its collection, nor any color of defence, permanent or temporary, to the mortgagor or debtor, when payment is sought to be enforced. He is not allowed to assert that the vitality of his own obligation has become extinct by the illegal use to which that obligation has been applied, and thence infer that he is no longer liable on his engagement. Such a principle can hardly be seriously urged, and such a consequence cannot for a moment be admitted." In the case of *Boone* v. *Chiles*, (10 *Peters*, 179,) a bill was filed to compel the conveyance of the legal title and an account of the rents and profits of certain land. The suit was brought in pursuance of an agreement made between the plaintiff and a third person, by which such third person undertook, at his own expense, to prosecute a suit for the land, and, as a consideration, he was to have one-half of the land. The defendants set up such agreement as a defence, and claimed that the case was one of champerty, in which the Court could give no relief. The Court held, that the objection to the plaintiff's recovery, on the ground of the agreement in question being champertous, could not be sustained; that the suit, although instituted in furtherance of the agreement, was not between the parties to it; that it did not concern the defendants whether the suit was commenced and conducted by the agency of the third party or by the plaintiff; and that the right of the plaintiff was not forfeited by such an agreement, and might be asserted against the defendants, whether the agreement made by the plaintiff with the third party was valid or void. In the case of *Hilton* v. *Woods*, (36 *Law Journal, new series, part* 1, *Chy. & Bankcy.*, 941,) a bill was

filed to establish the right of the plaintiff to the coal mines under certain lands. It was shown to have been filed under an agreement made between the plaintiff and a third party, whereby, in consideration that the third party guaranteed the plaintiff against any costs in the suit, such third party was to have a portion of the value of the property, if recovered. Vice Chancellor Malins said that he had carefully examined all the authorities referred to in support of the argument that the agreement under which the suit was instituted amounted to champerty and maintenance, and consequently disqualified the plaintiff to sue. He added: "They clearly establish, that whenever the right of the plaintiff, in respect of which he sues, is derived under a title founded on champerty or maintenance, his suit will on that account necessarily fail. But no authority was cited, nor have I met with any, which goes the length of deciding, that where a plaintiff has an original and good title to property, he becomes disqualified to sue for it by having entered into an improper bargain with his solicitor as to the mode of remunerating him for his professional services in the suit or otherwise." He further said, that the agreement in question amounted to maintenance, and, if the third party had been the plaintiff, suing by virtue of a title derived under that agreement, the bill would have been dismissed; but that, as the plaintiff was asserting a title vested in him before he entered into the improper agreement, he was not disqualified to sustain the suit. In the present case, Prescott can claim no greater benefit from the agreement with Lathrop than the bankrupts themselves could claim, as against Morgan and Clark. The objection in respect of champerty is, therefore, overruled.

The substance of the petition of Prescott is, that he is a creditor of the bankrupts, by debts proved by him herein, to the amount of $54,100.16; that, after the bankrupts were declared such, Morgan and Clark re-

quested him to buy a note they held against the bankrupts, amounting to $173.63, due November 17th, 1867; that he bought it, at a price agreed on, and it was transferred to him by Morgan and Clark, and he has ever since owned it; that he has proved it as a claim herein; that Morgan and Clark have proved a pretended claim herein of $86.61, part of the said note for $173.63; that Morgan and Clark have also proved a pretended claim herein of $5.95; and that Morgan and Clark have no claims against the bankrupts, and the two claims proved by them are founded in fraud, illegality, or mistake.

A vast volume of testimony has been taken before the register, on the reference. It is claimed, on the part of Morgan and Clark, that the evidence shows that the alleged sale of the note by Morgan and Clark to Prescott, which was made at the price of fifty cents on the dollar, was not a sale to Prescott; that it was induced by false representations, made by the bankrupts, and by Prescott; that Prescott, in purchasing the note, did not act for himself, but acted for the bankrupts, and as their agent; and that the money he used in buying the note was not his own money, but was the proceeds of collections of assets which belonged to the bankrupts at the time their petition in bankruptcy was filed.

It is apparent, from the evidence, that Morgan and Clark, in parting with the note to Prescott, and receiving the fifty per cent. thereon, supposed they were settling and compromising with the bankrupts in respect of the note. They were not selling the note, in reality, to Prescott, and Prescott was not buying it. He was acting for the bankrupts. The purchase was one made for and by the bankrupts. Morgan and Clark cannot prove a part of the debt, nor can Prescott prove the whole of it. But, Morgan and Clark, not being creditors in respect of any part of it, cannot question the right of Prescott to prove it. That right must be questioned otherwise. I see no evidence that the compromise was made by Mor-

gan and Clark by means of any false representations made by the bankrupts, or by any one of them, or by Prescott as their agent. It is apparent, that they compromised the claim, because they regarded it as more advantageous to them to take, in cash, one-half of the claim, than to hold the claim longer. The proposition that, even though no false or fraudulent representations were made by the bankrupts, or by Prescott, to induce the compromise by Morgan and Clark, they are entitled to hold their claim against the estate of the bankrupts for the balance beyond the fifty per cent., cannot be maintained. As to fraud, if the contract of compromise were void for fraud, so as to give to Morgan and Clark the right to ask for its rescission, they are not in a position to do so. Such contract, if void for fraud, must be so void in the whole, and not in part. Morgan and Clark, by proving their claim for the one-half of the note, while they retain the fifty per cent. paid, and do not offer to return it, and while they insist that they did not sell the note to Prescott, and that they were engaged in making a compromise in regard to it with the bankrupts, are seeking to affirm one-half of the contract, and to disaffirm the other half. This they cannot do.

As to the claim of $5.95, I think it has no existence, aside from the note, and that it was merged in the note, when that was made.

It follows, that the proofs of debt filed by Morgan and Clark must be disallowed and rejected. It is provided, however, by the 22d section of the bankruptcy Act, that "the Court may, on the application of the assignee, or of the bankrupt, or without any application, examine upon oath the bankrupt, or any person tendering, or who has made, proof of claims, and may summon any person capable of giving evidence concerning such proof, or concerning the debt sought to be proved, and shall reject all claims not duly proved, or where the proof shows the claim to be founded in fraud, illegality,

or mistake." As such examination may be made without application therefor, and as the Court sees, from the testimony now before it, that the claims proved by Prescott, and those proved by other persons, and since purchased by Prescott, are not the property of Prescott, for the reason that he acted for the bankrupts in purchasing such claims, both unproved and proved, they must be rejected as illegal.

It is not necessary to determine now what funds were used by the bankrupts to make the purchases which Prescott made for them.

An order of reference will be made to the register in charge of this case, to report, on the testimony heretofore taken, and on such further testimony as he may choose to take, what claims proved by Prescott, or proved by others and since purchased by Prescott, ought to be rejected under the foregoing decision.

Vernam & Wilcox, for Morgan and Clark.

E. W. Stoughton and *D. A. Hawkins*, for Prescott.

NOVEMBER, 1869.

PAUL S. FORBES *et al. v.* ELLEN M. MURRAY, EXECUTRIX, &c., *et al.*

Freight Payable in Sterling Money.

On a bill of lading, executed in Whampoa, for the transportation of cargo to New York, the freight in which was specified to be payable in sterling money:

Held, That the shipowners were entitled to recover what it could be shown by evidence that the specified amount of British coin was worth in New York, in gold and silver coin of the United States, the recovery to be expressed in the decree to be in gold and silver coin of the United States.

BLATCHFORD, J. This is a libel *in personam*, filed to recover the amount of freight money claimed to be due for the transportation of one hundred and ninety cases of fans from Whampoa to New York, by the ship Resolute. The contract of transportation is expressed in a bill of lading given by the vessel, dated February 12th, 1864, and the amount of freight money specified therein as to be paid for the service is one hundred and sixty-three pounds, four shillings, and four pence, sterling. The only question presented in the case is, as to what amount, in money of the United States, the libellants are entitled to recover for the one hundred and sixty-three pounds, four shillings, and four pence, sterling, as being payable in New York, June 21st, 1864. It is not averred in the libel, in what money the amount specified in the bill of lading is expressed, nor is there any evidence in the case as to what was intended by the number of pounds, shillings, and pence, sterling, thus specified. Assuming that it can be proved, or will be stipulated, that the contract was for the payment of so many pounds, shillings, and pence, in the sterling money of Great Britain and Ireland, in coin, in New York, on the delivery of the property there, June 21st, 1864, the libellants are entitled to recover what it can be shown by evidence that the specified amount of British coin was worth in New York, in gold and silver coined money of the United States, on the 21st of June, 1864. For that amount, in such coined money of the United States, with interest thereon, at the rate of seven per cent. per annum, the libellants will be entitled to a decree, the recovery to be expressed to be in the gold and silver coin of the United States. (*Bronson* v. *Rodes*, 7 *Wallace*, 229; *Butler* v. *Horwitz*, *Id.*, 258.)

Beebe, *Dean*, *& Donohue*, for the libellants.

H. W. Robinson, for the respondents.

Southern District of New York,

MARCH, 1868.

SAMUEL BAKER *v.* JAMES E. WARD *et al.**

GOLD CONTRACT.—CHARTER PARTY.—FALSE REPRESENTATIONS.—PARTIES.

Where a vessel was chartered for a voyage from New York to Havana, for the sum of $2,900, payable in gold on the proper discharge of the cargo in Havana, of which sum $2,201.50 in gold had been paid:

Held, That the owners of the vessel were entitled to a decree for $698,50, without reference to any premium on gold.

Where a charter party of a vessel stated her to be "of the burthen of 427 tons, or thereabouts," but contained no other statement as to her carrying capacity:

Held, That any other agreement as to her carrying capacity must be held to have been waived by the charterer, and that evidence of false representations by the owners as to her carrying capacity, and of the charterers being induced thereby to make the charter, was inadmissible.

Where a charter party was signed by the libellant as master and agent of the vessel, and the charterers agreed in it to pay the charter money to him or his agent:

Held, That a suit to recover the charter money was properly brought by the master alone, without joining the owners of the vessel as libellants.

BLATCHFORD, J.—On the 26th of July, 1866, the libellant, as master of the British bark Vivid, entered into a charter party at New-York with the respondents, for the charter of the vessel to them, for a voyage from New York to Havana, for the sum of $2,900

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* Since the decision of the Supreme Court of the United States, in April, 1871, on the Legal Tender Act, I have thought it best to publish here this decision, made by Judge BLATCHFORD, in March, 1868, and omitted in its order, so that all the cases in this Court, in which the gold question was involved, may be included in these reports.

R. D. B.

charter money, payable in gold on the proper discharge of the cargo in Havana. The libel avers the performance of the charter by the vessel, by the delivery of the cargo at Havana on or before the 25th of October, 1866, and that only $2,201.50 in gold has been paid on account of the charter money, and claims a decree for $1,005.84, in the lawful money of the United States, being the equivalent of $698.50, in gold, at the time of the commencement of the suit.

The answer sets up, that, at and before the making of the charter party, the libellant, in order to induce the respondents to enter into the charter, falsely and fraudulently represented to them that the vessel would carry and had already carried 3,000 round barrels of oil; that the respondents, relying upon such representations and believing the same to be true, chartered the vessel and loaded her for the voyage mentioned in the charter with all the cargo she could carry; that she would not carry 3,000 round barrels of oil, but only 2,600; that such representations were false and known by the libellant to be so; that the respondents sustained great damage therefrom; and that, by reason thereof, the charter was void.

The charter party, of which a copy is annexed to the libel and forms a part of it, contains no statement of the carrying capacity of the vessel. It merely states, that the vessel is "of the burden of 427 tons or thereabouts." The respondents, at the trial, offered to show, by evidence, the making by the libellant, and the falsity, of the representations before named; that such representations induced the respondents to enter into the charter party and to agree to pay a larger sum for charter money than they would otherwise have agreed to pay; that the libellant knew such representations to be false; and that, on the voyage in question, the vessel was loaded to her full capacity and carried only the bulk of 2,600 round barrels of oil. The Court excluded such evidence, on an

objection to it by the libellant. The evidence was inadmissible, for the reason that, the charter party being in writing, parol evidence was not admissible to vary its terms, and that any stipulation or agreement, as to the carrying capacity of the vessel, which was not found in the written contract, must be considered as having been waived by the respondents. (1 *Parsons on Maritime Law*, *book* 1, *chap.* 8, *page* 230; *The Eli Whitney*, 1 *Blatchf. C. C. R.*, 360; *Pitkin* v. *Brainerd*, 5 *Conn.*, 451; *Renard* v. *Sampson*, 2 *Kernan*, 561.)

The answer excepts to the libel on the ground that the libellant has no interest in the alleged cause of action set forth in the libel, and, therefore, cannot maintain this action, and on the further ground that the owners of the vessel should have been joined and made parties libellants in the action. The charter party was made with the libellant and describes him as master and agent of the vessel, and by it the respondents agree to pay the charter money to the libellant or to his agent. The respondents are, therefore, estopped from denying the right of the libellant to bring this suit, and it was not necessary to join the owners of the vessel as parties.

The libellant is, therefore, entitled to recover the amount unpaid on the charter money, namely, the sum of $698.50, with interest thereon, at the rate of 7 per cent. per annum, from October 25th, 1866. But he claims that he should have a decree for this amount in gold, or for an amount which is the equivalent, in legal-tender notes, of that amount in gold. I have heretofore considered this question, both on principle and on authority, and have held that, under circumstances such as exist in this case, the party suing is entitled only to a decree for the number of unpaid dollars due to him under his contract, and that the addition of the words "in gold," in the contract, is, in view of the legal-tender Acts of February 25th and July 11th, 1862, (12 *U. S. Stat. at Large*, 345, 532,) to be treated as surplusage, or, what is

the same thing in effect, that the decree is to be for the debt at the number of dollars expressed in the contract, with the privilege to the debtor to discharge it in the legal tender notes. (*The Blohm*, 1 *Ben.*, 228; *The Mary J. Vaughan*, 2 *Ben.*, 47.) If the libellant should have one of the alternatives which he asks for in this case, a decree for the $698.50, with interest, "payable in gold," (and he can have nothing more than his contract calls for, so many dollars in gold,) still the respondents would have the right to discharge the decree, dollar for dollar, in legal tender notes. The law is express to that effect. The United States notes are made, by law, "lawful money and a legal tender in payment of all debts, public and private, within the United States, except duties on imports" and certain interest due to and by the United States. A decree in this case for so many dollars, payable in gold, would be a private debt, to be paid within the United States, and it would be impossible to withhold from the respondents the privilege of paying it, dollar for dollar, in legal tender notes, without holding the statutes on the subject to be void, and without declaring that what the law-making power has said shall be lawful money and a legal tender in payment of the debt, shall not be lawful money or such legal tender.

The libellant seeks, however, to evade the force of the legal tender Act, by claiming, in his libel, that the number of dollars due to him in gold is "equal to the sum of $1,005.84, lawful money of the United States," and by asking a decree for the latter sum. The meaning of this averment must be merely, that the $698.50 in gold is equal to $1,005.84 in the United States notes which are made a legal tender by law. The gold and silver coins of the United States continue to be lawful money of the United States, and to be legal tenders to the extent prescribed by statute, as well since the passage of the Acts making the United States notes legal tenders, as before. The silver dollar, containing the preseribed

weight of silver, is still the unit, and is still lawful money and a legal tender, according to its nominal value; and the double eagle, eagle, half eagle, and quarter eagle, containing severally the prescribed weights of gold, are still lawful money, and are still respectively legal tenders, for twenty, ten, five, and two and a half of such units. The intent of the Acts of Congress was to put the United States note representing nominally one dollar, on the same footing, as to being lawful money, and a legal tender for a private debt, as the coined dollar. Wherever a debt exists which amounts to so many dollars in gold, an equal amount of United States notes, at their nominal value, will discharge it. If this were not so, the legal tender Acts would be a juggle. They could be evaded without difficulty. All that it would be necessary to do would be to increase the amount of a contract debt to a number of dollars sufficiently large to deprive the debtor of the privilege which the Acts intended to inforce upon him. But the Court has no power to do this. The number of dollars is nominated in the contract. The words "in gold" mean no more than the words "lawful money." The contract is for so many dollars, lawful money, and the decree must be for that number of dollars, and it can be discharged in any money that is lawful money and a legal tender. When the statutes say that the United States note of one dollar nominal value shall be lawful money and a legal tender for a private debt, within the United States, they mean that it shall be a legal tender, at its nominal value, for a debt amounting to one dollar in any other money that is lawful money within the United States, and that such debt may and shall be fully discharged by the payment or tender of such note. Some of the statutes of the United States, as, for instance, the Act of January 18th, 1837, (5 *U. S. Stat. at Large*, 137, *sec.* 9,) in making certain coins of the United States a legal tender, say that they shall be legal tenders "according to their

nominal value." Other statutes merely say that they shall be legal tenders. The statutes in regard to the United States notes only say that they shall be "a legal tender." But the necessary meaning of all those statutes is, that the coins and notes shall be legal tenders according to the nominal values impressed on them, and which they exhibit to the eye. Now, to say that the respondents must pay $1,005.84, in United States notes, to discharge $698.50, of private indebtedness, payable in gold, would be to say that the United States note of one dollar, instead of being a legal tender at its nominal value, for one dollar of the $698.50 gold, shall be a legal tender at less than its nominal value, for such one dollar of gold, and that the indebtedness represented by such one dollar of gold shall not be fully discharged by the payment or tender of the United States note of one dollar. The decree would violate the express language of the Acts of Congress. Moreover, such a decree would violate the contract of the parties. The libellant contracted, at New York, for the payment to him, at Havana, of so many dollars in gold. He and the respondents did this with the full knowledge, on the part of both of them, that, so far as this contract provided for the creation of a debt which the respondents should ever be called upon to pay within the United States, the respondents would have the privilege of paying it in United States notes, dollar for dollar, at the nominal value of such notes. To deprive the respondents of this privilege, which the libellant voluntarily conferred upon them, would be to do what the Court has no right to do. The libellant has resorted to this forum for the collection of his debt, and he must submit to the law of the forum.

It was urged by the counsel for the libellant, that two cases, recently decided by the Supreme Court of the United States, one at the December term, 1865, (*Cheang Kee* v. *The United States*, 3 *Wallace*, 320,) and the other at the December term, 1866, (*Thompson* v. *Riggs*, 5 *Wal-*

lace, 663,) establish a contrary doctrine to that held by this Court. I have examined those cases with care, and am unable to see anything in either of them that is in conflict with the views expressed in this decision.

The case of *Cheang Kee* v. *The United States* only decides that, in a suit brought by the United States, to recover duties on imports, after the passage of the legal tender Act of February 25th, 1862, a judgment in favor of the United States, against the defendant, for "$1,388.10, payable in gold and silver coin, for duties," is a proper judgment; that the statement in the judgment, that the amount recovered is "payable in gold and silver coin, for duties," is merely a declaration of the legal effect of the judgment; and that such statement, although unnecessary, is strictly correct, and cannot affect the validity of the judgment, for the reason that it is a judgment for duties on imports, and that nothing but gold and silver coin is a legal tender for that description of indebtedness to the Government. If any conclusion is to be drawn from that decision, as an authority bearing on the present case, it is a conclusion adverse to the view urged by the libellant, for it would seem to follow from the decision, that where, as in the present case, one of a private debt, something else, in addition to gold and silver coin, is a legal tender for the debt, a judgment for the amount of the debt, "payable in gold and silver coin," is improper.

The case of *Thompson* v. *Riggs* was this: At the time of the passage of the legal tender Act of February 25th, 1862, Thompson had in the hands of Riggs, as a banker, on deposit, $6,600. The deposit was not a special deposit, but was a general deposit, and was subject to no condition or special agreement of any kind, but was made under such circumstances that Thompson parted with his title to the money, and such title became vested in Riggs, and Riggs became debtor for the amount to Thompson. Two years after the passage of the legal

tender Act, and when gold had risen to a premium of 57 per cent. above the value of legal tender notes, Thompson demanded the $6,600 in coin. Riggs tendered it in legal tender notes. Thompson then sued to recover a sum of money equal to the value in legal tender notes of $6,600 gold coin. The suit was not brought to recover any thing that was deposited after the passage of the legal tender Act. There was a verdict and a judgment for Riggs, the defendant. Thompson then carried the case by writ of error to the Supreme Court, which affirmed the judgment. The language of the Court (Mr. Justice Clifford delivering its opinion) in the case is to the effect, that, where a special deposit of bullion or coin is made with a banker, under such circumstances that the title to the thing or money deposited does not pass to the banker, but remains in the depositor, then the banker becomes the bailee of the depositor, and the latter may rightfully demand as his property the identical thing or money deposited; but that, where the deposit is general, and under such circumstances that the title to the money deposited, whether it is coin or legal tender notes, passes to the banker, the transaction is unaffected by the character of the money in which the deposit is made, and the banker becomes liable for the amount of the money as a debt, and can discharge the debt by any money that is by law a legal tender. (*The Bank of Kentucky* v. *Wister*, 2 *Peters*, 318, 325.) These views ofthe Supreme Court give no support to the claim made by the libellant.

The true doctrine on the subject is no where expressed better than by *Pothier*, (*Traité du Contrat de Vente, n.* 416, *Cushing's translation, pp.* 264, 265:) "It remains to be observed, in regard to the price, that it may be rendered in a money different from that in which it is paid. If it is paid to the seller in gold, the seller may repay it in pieces of silver, or *vice versa.* In like manner, though, subsequent to the payment of the price, the pieces in

which it is paid are increased or diminished in value, though they are discredited, and, at the time of the redemption, their place is supplied by new ones of better or worse alloy, the seller, who exercises the redemption, ought to repay, in money which is current at the time he redeems, the same sum or quantity which he received in payment, and nothing more nor less. The reason is, that, in money, we do not regard the coins, which constitute it, but only the value which the sovereign has been pleased that they shall signify; *Ea materia formâ publicâ percussa, usum dominiumque non tam ex substantia præbet, quam ex quantitate;* D. 18, 1, 1. When the price is paid, the seller is not considered to receive the particular pieces so much as the sum or value which they signify, and consequently, he ought to repay, and it is sufficient for him to repay, the same sum or value in pieces which are current, and which have the signs, authorized by the prince, to signify that value." These views apply to all debts solvable in money, and to all money which the sovereign declares to be lawful money. Of course, I assume that the legal tender Acts are constitutional and valid laws. I hold them to be so both on principle and on authority.

The libellant is entitled to a decree for $698.50, with interest from October 25th, 1866, and for the costs of the suit.

Smedberg and *Da Costa*, for the libellant.

Beebe, *Dean* and *Donohue*, for the respondents.

Eastern District of New York,

NOVEMBER, 1869.

THE STEAMER MISSOURI.

LIEN FOR PENALTY.—FALSE MANIFEST.—JURISDICTION.

Under the 24th section of the Act of March 2d, 1799, (1 *Stats. at Large, p.* 646,) which enacts that if goods imported in a vessel of the United States are not entered on the ship's manifest, the master shall forfeit and pay a sum equal to their value, and the 8th section of the Act of July 18th, 1866, (14 *Stats. at Large, p.* 180,) which provides that where a vessel or her owner or master are subject to a penalty for a violation of the Revenue Laws, "such vessel shall be holden for the payment of such penalty, and may be proceeded against summarily, by libel, to recover such penalty, in any District Court of the United States having jurisdiction of the offence," it is not necessary, in a libel filed against a vessel to recover such a penalty, to aver any prior seizure of the ship.

It is not a necessary preliminary to such a suit, that the ship should have been seized, or that proceedings to recover the penalty should have been instituted against the master or the owner personally.

Such a suit against a vessel is a civil case of admiralty and maritime jurisdiction, and is within the jurisdiction of the Court. It is so, because the subject-matter is maritime in its nature.

Liens upon a ship are necessities of her existence and usefulness. They are to her what credit is to a merchant.

A proceeding against a ship, *in rem*, is, in some sense, her bankruptcy proceeding.

BENEDICT, J. This is a proceeding *in rem* instituted in behalf of the United States against the steamer "Missouri," to recover the sum of $2,998.00, for which sum it is claimed that this steamer is holden to the United States under the laws thereof.

The averments of the libel are, that, at a certain specified time, certain goods, wares and merchandise, which are particularly described, were imported and brought into the United States from a foreign port in

this vessel, which were not included in her manifest, contrary to the Act of Congress passed March 2d, 1799, and which belonged to or were consigned to the master, mate, officers and crew of said vessel; that the value of said merchandise was $2,998, and, by reason of the premises, and by force of the statute in such case made and provided, the said vessel, her tackle, apparel and furniture, became liable to the United States for the payment of the sum of $2,998, as a penalty. Wherefore it was prayed that process *in rem* issue against said vessel, her tackle, apparel and furniture, to enforce the payment of said penalty, and that the vessel might be arrested, and the said penalty pronounced for by the Court, and the vessel condemned and sold to pay the same. Under this libel the usual process *in rem*, according to the course of the admiralty, was issued against the vessel, by virtue of which she was duly seized in waters within the jurisdiction of this Court, whereupon the claimants duly appeared and filed their claim, and at the same time excepted to the libel—which exceptions are now to be disposed of.

The question raised as to the jurisdiction is first to be considered.

A statement of the provisions of law under which this libel is filed, is necessary to show the precise questions which the case presents.

The Act of March 2d, 1799, Sect. 24, (1 *Stat.* 646,) which is referred to in the libel, provides as follows:

"If any goods, wares and merchandise shall be imported or brought into the United States in any ship or vessel whatever belonging in the whole or in part to a citizen or citizens, inhabitant or inhabitants of the United States, from any foreign port or place, without having a manifest or manifests on board, agreeably to the directions in the foregoing section, or which shall not be included or described therein or shall not agree therewith: in every such case the master or other person having the charge or command of such ship or vessel

shall forfeit and pay a sum of money equal to the value of such goods not included in such manifest or manifests."

Subsequently it was by statute enacted (*see Act of July* 18th, 1866, *sec.* 8, 14 *Stat. at Large, p*, 180): "That in any case where a vessel, or owner, or master, or manager of a vessel shall be subject to a penalty for a violation of the Revenue Laws of the United States, *such vessel shall be holden for the payment of such penalty*," and may be seized and proceeded against summarily, by libel, to recover such penalty, in any District Court of the United States having jurisdiction of the offence."

Under these two provisions of law it is here contended, on the part of the Government, that, by reason of the facts set forth in the libel, a lien has been created upon this steamer for the sum of $2,998, which lien may be enforced by ordinary proceedings *in rem* upon the instance side of the Court, and that such proceedings may be taken in any District where the vessel may be found, without previous seizure thereof—all which propositions the claimants deny.

The Act of July 18th, 1866, under which this libel is filed, is an instance of incorporating into the revenue laws that marked feature of the maritime law which treats a ship as a person, and makes her personally responsible for the acts of those who own or control her. Such legislation is but the offspring of that necessity, out of which sprang the rule of the maritime law. It was long ago found necessary, in order to regulate the business and conduct of ships, which wander everywhere and are the efficient agents both for good and evil of persons often entirely unknown or impossible to be found, as between man and man, to charge the ship—which is always known and can always be found—not only with the contracts but the torts of her master and her owners.

This same necessity has been felt in respect to the dealings of the ship master and ship owner with the Government, and accordingly the Act of 1866, in order

to secure obedience to the revenue laws, causes the unlawful acts of the ship master and ship owner to charge the ship herself with the penalties prescribed for the violation of those laws.

The legal effect of this statute, therefore, taken in connection with the Act of March 2d, 1799, is to cause the unlawful transportation of cargo by the master, contrary to the Act of March 2d, 1799, to charge the ship with the penalty there prescribed, in the same manner as, according to the maritime law, a violation of the sailing rules by the master, which causes a collision, charges the ship with the damages ensuing.

In construing such a statute, milder, as it is, than many statutes, it should be borne in mind, that it is a revenue law, and, like all revenue laws, to be so construed as effectually to accomplish the intention of the legislature, and not, necessarily, with great strictness in favor of the defendant. (*Taylor* v. *U. S.*, 3 *How.*, 210.)

Let it be noticed, then, that the Act does not declare a forfeiture, but simply creates a charge upon the ship, and that the case made by the libel is not one of seizure, but of lien.

Property forfeited to the Government may be seized, but I am not aware that a seizure is ever permitted, except when the title to the property has changed, by operation of law. A seizure is an assertion of title in the Government, and the subsequent proceedings in Court are proceedings to try the title so asserted. When the object of such a seizure is a ship, the subsequent proceeding is, in substance, a petitory suit, and within the admiralty and maritime jurisdiction of the United States. The Act, therefore, would not support a seizure, for it does not order a forfeiture.

But, it is said, this cannot be so, because the Act expressly provides for a seizure, when it declares that the ship "may be seized, and proceeded against summarily, by libel."

The word "seized," as here used, cannot, however, be considered as referring to a revenue seizure, but to that seizure by the marshal, under the process of the Court, which forms part of every proceeding *in rem*, in the admiralty. So construed, the provision for a seizure and summary hearing, upon a libel, is simply a statutory averment of the jurisdiction of the District Courts, to enforce the lien, which the Act creates, according to the course of the admiralty. This construction of the Act is, certainly, reasonable, while to hold that the word "seizure," as used, was intended to authorize an assertion of title to property not forfeited, but simply subject to a lien, perhaps insignificant in amount, would be to give to the statute a strange and harsh effect. My opinion, therefore, is, the objection to the libel, that it does not aver a seizure within the district, must fail. No such averment is necessary, because no prior seizure could be legally made, in a case like this.

The case being, then, simply a proceeding to enforce a lien, the next question is, whether it is a civil case of admiralty and maritime jurisdiction.

It might be deemed a sufficient answer to this question, to say, that the Act, when it declares that the proceeding against the ship shall be by libel, clearly intended to declare the cases under it to be cases of admiralty jurisdiction. But if this be not so, or if a doubt be entertained as to the competency of the legislature to require a proceeding according to the course of the admiralty, in a case not within the constitutional provision, I hold the present case to be within the admiralty and maritime jurisdiction conferred by the Constitution, and for two reasons.

One reason—to my own mind entirely satisfactory—is, that it is a proceeding to enforce a lien upon a ship. A ship is never free from liens. From her cradle on the stocks, to her grave in the sand, she is always, to a greater or less degree, encumbered by those charges

which attach to her, under the rules of the maritime law. These liens are necessities of her existence and usefulness as a ship. They are to the ship what credit is to the merchant. Without them, she must lie by the wall; by means of them, she plows the sea. A proceeding to enforce any lien upon a ship, by her sale—which is the only method of enforcing a lien—must, if injustice is to be avoided, call in question all the liens upon her, and must, accordingly, involve an adjudication upon liens created by the maritime law, and exclusively maritime in their nature. It would seem, therefore, that it might well be held, for this reason, if for no other, that all such proceedings should be taken in that Court to which the determination of maritime questions more especially belongs.

And all such proceedings should be held to be within the jurisdiction of the admiralty, for the further reason, that the proceeding *in rem* of the admiralty is the only proceeding, known to the law, which is competent to determine the rights which are liable to be involved by any attempt to enforce a lien upon a ship.

An illustration, such as might be presented any day, will serve to show the correctness of this proposition. Suppose, then, the case of a lien upon a ship, to the extent of her value, under this Act of 1866, and that the ship proves to have been heavily bottomried abroad, and, on the voyage home, to have sustained a collision, by which a ship, equal to her in value, has been sunk. Of course, upon arrival, she owes a considerable sum to her crew, and her cargo turns out damaged by the disaster. If, in such a case, the lien of the Government is to be enforced by a suit at law, who is to be the defendant? Do you say, the owners? They have no interest to defend, until they have successfully disputed both the bottomry and the collision demands. If you say, the bond-holder, his interest depends upon the validity of his bond, and the invalidity of the collision demand; and

that, in turn, can only be recognized after it appears that the cause of the collision was faulty navigation of the vessel proceeded against; and what, in such a suit, is to become of the sailors, and of the demands of the numerous freighters?

To such a state of facts—and I have supposed no unreasonable case—a suit at law is inadequate. In all such cases, the proceeding *in rem* of the admiralty, to which all the world are parties—a proceeding which is, in some sense, the ship's bankrupt proceeding, whereby she is discharged of all her debts, and her value distributed among her creditors—a proceeding, of which the Supreme Court, in the case of *The Moses Taylor*, (4 *Wall.*, 427,) say, "The distinguishing and characteristic feature of a proceeding in admiralty is, that the vessel or thing proceeded against is itself seized, and impleaded defendant, and judged, and sentenced accordingly,"—such a proceeding, I say, is a necessity, if injustice is to be avoided. By means of that most sensible and useful of legal proceedings, the conflicting demands of the Government, of the bondholder, of the owner, of the crew and of the freighters in the case supposed, are all easily adjudicated and disposed of at once—perhaps even the ship meanwhile earning a sum equal to them all, to the advantage of her owners, and the benefit of mankind.

My own opinion, therefore, is, that a sufficient reason for sustaining the jurisdiction of the admiralty in a case like this is to be found in the nature of the thing to be proceeded against—namely, a ship.

But a second reason can be given, and that is, that the subject-matter, which is the foundation of the charge upon the ship, is clearly maritime in its character, and therefore within the admiralty and maritime jurisdiction of the United States. The lien which is sought to be enforced arises, under the statute, out of an alleged unlawful importation of cargo by this ship. This is as clearly a "water transaction"—to use the words of Chief Jus-

tice Marshall—as the exportation of cargo, and in the case of *The Vengeance*, (3 *Dal.* 297,) the jurisdiction was sustained upon the sole ground that the exportation of cargo in a ship was a water transaction. Such matters have indeed long been conceded to be within the lawful jurisdiction of the admiralty. (*Godolphin*, 43.)

If, then, the subject-matter out of which the lien arises be maritime, the lien, although created by statute, may be enforced in the admiralty. (*The St. Lawrence*, 1 *Black*, 522.)

Because of the subject-matter, therefore, I hold the present proceeding to be a case within the admiralty and maritime jurisdiction of the United States.

Nor do I see any difficulties, in the way of enforcing the Act of July, 1866, in accordance with these views, such as seem to have occurred to the minds of some, in considering the effect of similar provisions in the passenger laws. The provision of the Act which requires the proceeding to be by libel in the admiralty, would doubtless be held to import that the lien is to be treated according to the principles and rules of the admiralty, which are ample to prevent injustice and also to protect commerce.

Again, it is objected to this libel that it fails to show jurisdiction in this Court, inasmuch as the libel does not show that jurisdiction of a criminal prosecution for the illegal importation of the cargo in question is in the District Court of this district, while the Act of 1866 declares that the proceedings against the vessel shall be "in the District Court having jurisdiction of the offence."

If it were necessary, controlling reasons could be assigned against holding the word offence, as here used, to refer to the criminal act of the master or owner, but I understand it to be conceded that this cargo was brought from a foreign port to the city of New York by way of Sandy Hook, and an amendment of the libel

to correspond with the facts will therefore obviate the necessity of determining this point in this case. The offence, created by the 24th section of the Act of March 2d, 1799, is complete when the goods are brought within the limits of a port of entry, (2 *Curtis*, 436, *U. S.* v. *Ten thousand cigars*,) and all cargoes brought from sea by Sandy Hook to the port of entry of New York, first arrive at such port within the limits of the Eastern District of New York. Under any construction, this Court would accordingly have jurisdiction. Furthermore, I apprehend that the provision of the Act of February 25th, 1865, which confers upon this Court concurrent jurisdiction with the Southern District of New York over all seizures and matters made or done in the waters of the harbor of New York, would cover the case.

There remains to consider one other objection to this libel, which is, that it contains no averment of a prior judgment against the master for the penalty now sought to be recovered against the vessel.

Upon this question my opinion is, that, under the Act of 1866, proceedings like the present may be taken against the vessel in the absence of any proceedings against the master or owner.

The obvious intention of the Act was to enable the Government to enforce the revenue laws by a prompt seizure and prosecution of the vessel, in case of a violation of them. It therefore declares that, when the master or owner incurs a penalty, the vessel may be seized and proceeded against summarily. If a forfeiture had been declared, any previous proceedings against the master would not have been suggested; and a forfeiture, to be followed by instant seizure without prior proceedings against any one, is frequently declared for the act of the master. Thus the Act of March 2d, 1799, forfeits the vessel, for the unloading of cargo before arrival at place of discharge, and also for the unloading without permit, or otherwise than in open day. The Act of June

27th, 1864, forfeits the vessel, for unloading except in presence of an inspector, and for a refusal of the *person in charge* to deliver the key. The Act of July 18th, 1866, forfeits the vessel, for failure of the master to report at the first port all goods bought for use of the vessel in British Provinces. The Act of 28th March, 1826, forfeits the vessel, for neglect of the master to deliver his manifest.

In place of instant forfeiture of the whole vessel, the Act of 1866 creates a lien, which is by far the milder form of punishment, and, if so construed as to render it as effective as possible, it will still be much less vigorous than many laws. It is easy, therefore, to say that the words, "holden for the payment of such penalty," used in this Act, are intended to create an original liability on the part of the ship for a penalty equal to that imposed upon the master or owner, and that the words, "seized and proceeded against summarily," preclude the idea of delay, and import that the proceeding may follow the unlawful act, and rest upon that alone—thus adopting the rule of the maritime law, that a ship may be treated as a person, and "judged and sentenced accordingly." (*The Moses Taylor*, 4 *Wall.* 427; *The Palmyra*, 12 *W.* 14.)

And it will be found that great difficulties attend any other construction of the Act, for if it be held that the ship becomes chargeable by the unlawful act when committed, but can only be proceeded against at the termination of proceedings against the master or owner, which may be commenced at any time within five years, a most dangerous class of secret liens upon ships will be created, to the great detriment of commerce, with but little, if any, advantage to the Government; while if it be held that, under the Act, the vessel first becomes chargeable upon the rendition of a judgment against the master or owner, the ship would become first chargeable long after the transaction, when she might meanwhile

have been sold to innocent parties, or encumbered by liens to her full value, or removed to foreign parts.

A further objection to the latter construction seems to me also entitled to great weight, namely, that, under it, the owners and other parties interested in the ship would be debarred from the right to contest the question of liability for the penalty. A judgment against the ship master, in an action where he would be the only defendant, and of which no others would have notice, would be conclusive of the liability of the ship. I cannot believe that such was the intention of the legislature.

On the other hand, it may be said, that, under the construction here sought to be given to the Act, the proceeding against the ship would often be a proceeding to collect an uncertain sum, inasmuch as many of the penalties imposed for violations of the revenue laws are, within certain limits, left to the discretion of the Court which tries the offender.

To which the sufficient answer is, that the same discretion can as well be exercised in the proceeding *in rem* against the ship, as in the proceeding *in personam* against the master. Proceedings *in rem*, for sums uncertain and dependent on the judicial discretion, are common proceedings in the admiralty, as, for instance, actions for salvage, personal injuries, and the like.

The considerations, which I have thus endeavored to present, seem to me to lead forcibly to the conclusion to which I have arrived, that, under the Act of 1866, taken in connection with the 24th sec. of the Act of March 2, 1799, the facts alleged to exist in the present case are sufficient to create a lien upon this steamer for the amount of the penalty claimed, which may be enforced by a proceeding in admiralty in this Court, without proof of a prior seizure of the vessel or of a prior judgment against the master for such penalty.

Let an order be entered over-ruling the exceptions,

and requiring the claimants to answer within one week, unless further time be granted.

For the United States, *B. F. Tracy, United States District Attorney.*

For claimants, *Goodrich* and *Wheeler.*

NOVEMBER, 1869.

THE UNITED STATES *v.* H. M. BARROWCLIFF.

INTERNAL REVENUE.—TOBACCO MANUFACTURER'S BOND.—SURETY.—LACHES.

It is no defence to an action by the Government, upon a bond given by a tobacco manufacturer, to recover an amount of duties, that the Government seized the manufacturer's goods as forfeited, instead of distraining upon them for the tax. Laches is not to be imputed to the Government in such a case.

BENEDICT, J. This was an action upon a tobacco manufacturer's bond, in which a verdict was rendered in favor of the Government for the amount of tax unpaid.

A motion for a new trial is now made, upon the ground that the Court erred in refusing to permit the defendants to show that, on the 23d day of May, the collector seized as forfeited and took from the possession of the defendant, Barrowcliff, the manufacturer, some $20,000 worth of manufactured and raw tobacco.

The proposition, upon which the objection to the exclusion of the evidence in regard to the tobacco which was forfeited is based, appears to be this, that the collector had power under section 83 and section 84 of the Revenue Act, (13 *Stat.*, 259,) to distrain upon this tobacco

which was forfeited, and so collect the tax, but did not do so, and that there was therefore laches, which discharged the surety upon the bond in suit.

The proposition is unsound. Laches is not to be imputed to the Government in such a case; and, assuming that there was neglect on the part of the collector in omitting to distrain, it would have no effect to work a discharge of the surety.

But I do not conceive that there was any neglect. Under the facts, both courses lay open to the Government—to collect the tax by suing the bond, and by seizing the tobacco to punish the frauds with which the manufacturer was charged in the information.

It was entirely competent, therefore, if, indeed, it was not required by duty, for the officers of the Government to adopt both proceedings, as otherwise no punishment for the fraud could be inflicted.

I certainly know of no principle upon which the Government could be held bound to waive its rights of forfeiture which had attached by reason of the frauds, in order to save sureties from a liability upon their bond which they knowingly assumed.

The motion must be denied.

Northern District of New York,

NOVEMBER, 1869.

LEWIS B. GRAHAM, ASSIGNEE OF CAROLINE A. MARTIN, A BANKRUPT, *v.* OLIVER STARK AND ELIZABETH B. SAVAGE.

FRAUDULENT PREFERENCE.—MORTGAGE.—AGENT.—INSOLVENCY.

A debtor, who is unable to meet his engagements and pay his debts in the ordinary course of business, as persons in trade usually do, is insolvent within the meaning of the bankruptcy Act.

Graham *v.* Stark.

When a creditor accepts a security for his debt, he is conclusively presumed to know what appears upon its face, and to have reasonable cause to believe it was intended to accomplish what must be its ordinary and necessary effect.

Securities given for the purpose of giving a preference, are none the less void under the bankruptcy Act, because they were given in pursuance of a previous promise, made when the debt was contracted, to give security for it.

Where a married woman, engaged in business, gave the management of her affairs to her husband, and was afterwards adjudged bankrupt:

Held, That his acts, knowledge and intentions in reference to the business must be held to be her acts, knowledge and intentions.

Where a mortgage was given by such bankrupt to secure a debt, but without the creditor's urging its execution or asking for security, but the mortgage covered the whole of the bankrupt's personal property, and was not given in the ordinary course of business, and other mortgages to another creditor were executed at the same time:

Held, That this mortgage was fraudulent and void under the bankruptcy Act;

That the other mortgages, which were on the stock and real estate, and were taken at a time and in a form which must necessarily break up the bankrupt's business, to secure a debt which had been overdue for a year and a half, were also fraudulent and void.

HALL, J. This is a proceeding by the assignee of Mrs. Martin, to set aside certain mortgages, executed by her prior to the filing of the petition on which she was adjudged a bankrupt.

The creditor's petition, on which such adjudication was made, was filed on the 5th day of November, 1868; and she was adjudged a bankrupt on the 2d day of February, 1869.

Mrs. Martin, a married woman, had, by her husband, De Lancey Martin, as her general agent, carried on the business of buying and selling hats, furs, gloves and furnishing goods, in her own name, and, professedly at least, on her separate account, for some years prior to May 28th, 1868. Her husband, in the conduct and management of this business, acted according to his own discretion, without any active interference or controlling supervision of the bankrupt. Indeed, the husband testified that the business was left *wholly* to him; that she knew nothing about the state of affairs in the store, except what he communicated to her; and she testified that he had the sole charge of the business.

The stock kept on hand was generally worth from $10,000 to $15,000, and the annual sales were ordinarily from $15,000 to $20,000.

In the course of this business Mrs. Martin contracted debts from time to time; and, on the 28th of May, 1868, such debts, including those secured on real estate, exceeded $10,500, and De Lancey Martin testified that such debts might have been nearly $12,000. At that time the stock of goods on hand was probably worth about $7,000, and she had a few dollars in cash, and notes and accounts worth in all about $1,500. She had, besides, a house and lot in Penn Yan, worth from $3,000 to $3,500, on which were two mortgages amounting to $1,600 or $1,700, both of which were overdue. Among her debts, owing to more than twenty different parties, (the larger portion of which debts was overdue,) was the debt due to the respondent, Elizabeth B. Savage, of $4,804.27, for money borrowed in 1865, and in the spring of 1866. It was borrowed to pay debts in New York, and was used for that purpose.

There was also among such debts a debt of $1,111.63 to the respondent, Oliver Stark; $1,000 of which was owing upon a note which he had discounted for her, and on which one Bridgen, a brother-in-law of the bankrupt, was an accommodation endorser, and which note was to become due June 22d, 1868. The original discount had been made two or three years before; and it had been renewed, from time to time, on notes payable in sixty days or three months, until the then existing note was given about the 20th day of March, 1868. The remaining $111.63 was for an overdraft by the bankrupt, which had occurred about a month before.

On or about the 28th of May, 1868, the bankrupt gave her promissory note of that date to the respondent, Savage, for $4,804.27, payable one day after that date; and, at the same time, executed to her a chattel mortgage of that date, upon the bankrupt's whole stock of

goods, conditioned for the payment of $4,804.27, according to the terms of such note.

In addition to this chattel mortgage, the bankrupt also executed a mortgage upon her house and lot, to secure $1,000 of such debt, payable one day after date, as collateral security to said chattel mortgage. This mortgage, though executed at the same time with the chattel mortgage, was dated on the 30th day of May, 1868. At the same time the bankrupt executed to the respondent, Stark, another chattel mortgage, on the whole of her stock of goods, to secure to him the payment of $111.63, one day after date, and the payment of the above mentioned note of $1,000, on which the brother-in-law of the bankrupt was an accommodation endorser.

After the execution of these instruments, and about the 2d of June, 1868, the bankrupt went to the Western States, and remained absent from this State until the 15th of October of that year, and until after an attachment had been levied upon her property at Penn Yan. A day or two before her return, she executed a deed in fee of her house and lot at Penn Yan, to one Blackman, without consideration paid at the time. Blackman had, however, sent her small sums of money for her expenses, at three or four different times, while she was absent from the State, but the amount he had so sent does not appear.

After the execution of the mortgages to the respondents, De Lancey Martin, as the agent of the bankrupt, continued in the possession of the stock of goods mortgaged, with the knowledge and assent of the mortgagees; and he continued to sell the goods mortgaged, at retail, as usual, until the 6th of October, 1868. He also bought new goods, defrayed current expenses, including payments for his own board, paid small debts to various persons, and kept the books of the establishment, and otherwise carried on the business of the bankrupt, the same as before the mortgages were given.

On the 6th of October, the respondents took possession of the goods mortgaged and turned De Lancey Martin, the bankrupt's husband and agent, out of the store. They then, by their own agent, continued the business and sold at retail, for three months, or thereabouts; and then sold the remainder of the goods to De Lancey Martin for $1,000; and four notes of $250 each, payable at 4, 6, 8, and 10 months, were given for the price of such goods.

The change of possession on the 6th of October, was made in the morning of that day; just before an attachment, which had been issued against the bankrupt, was levied on such of the notes and accounts, which had belonged to her, as yet remained on hand.

For some years prior to May, 1868, Mrs. Savage, the respondent, had lived in the bankrupt's house as her tenant; and Mr. and Mrs. Martin had boarded with Mrs. Savage—the amount charged for board and for rent being nearly equal. Mrs. Savage continued to occupy the house, and Mr. Martin continued to board with her, until after possession was taken under the chattel mortgages on the 6th of October, 1868. In July, 1868, Mrs. Savage purchased a mortgage of $600, and interest on Mrs. Martin's house and lot; and in November she purchased the other mortgage on the same, of $1,000, and interest. Both these purchases were made with the proceeds of the sales of the property mortgaged to her by the bankrupt on the 28th of May, 1868. In March, 1869, Mrs. Savage commenced an action to foreclose these mortgages, and the $1,000 mortgage executed to her as before stated; but her proceedings in that action were stayed by injunction.

It appears from the testimony of De Lancey Martin, that when the money was borrowed from Mrs. Savage, and when Mr. Bridgen endorsed the $1,000 note, it was agreed that they should be secured; that Mrs. Savage had asked for security for her debt one or two months

before the bankrupt went west, and that she spoke about it, and asked for such security several times before it was given,—urging that she wanted the bankrupt to give her security before she went away.

Bridgen had also frequently urged that the $1,000 note should be paid; and he had asked in the spring of the same year that security should be given in case it was not soon paid.

Having thus given the more prominent and undisputed facts of the case, the controverted questions of fact and law will now be discussed; and in doing this, further reference to the evidence bearing upon these questions of fact will necessarily be made.

Upon the question of the actual and hopeless insolvency of the bankrupt, at the time the mortgages to the respondents were given, there can be no well founded doubt. The apparent denials of the knowledge of this insolvency on the part of the bankrupt and her husband, must, in charity, be ascribed, so far as the husband is concerned, to a misapprehension of the legal definition of that term, as used in the bankruptcy Act—a misapprehension quite likely to arise from the not uncommon misunderstanding of that term; and, so far as the bankrupt is concerned, to a similar misapprehension, or to the fact that her actual financial condition had been carefully concealed from her by her husband. There is no pretence that she had met with any considerable loss or that her pecuniary circumstances had materially changed between the 28th of May, 1868, and the time the respondents took possession of her stock of goods on the 6th of October thereafter, and upon the whole evidence it is entirely certain that Mrs. Martin was then wholly unable to meet her engagements and pay her debts in the ordinary course of business as persons in trade usually do;—and she was therefore insolvent within the meaning of the bankruptcy Act. (2 *Kent's Com.* 389; *Thompson* v. *Thompson*, 4 *Cushing*, 127; *Lee* v. *Kilbourne*, 3 *Gray*,

594; *Spratt* v. *Hobhouse*, 4 *Bingham*, 173; *Buckingham* v. *McLean*, 13 *Howard*, 150; *Merchants' National Bank* v. *Truax*, 1 *Bankrupt Register*, 146; *In re Black*. *Ibid*, 81; *In re Gay*, 2 *Bankrupt Register*, 114; *In re Lewis*, *Ibid*, 145; *Morgan* v. *Mastick*, *Ibid*, 163.)

That DeLancey Martin, the agent of the bankrupt, and who had the entire management and control of her business, well knew that she could not meet her engagements, as persons in trade ordinarily do, is entirely clear; indeed he must have known that there was no probability that she would be able to continue her business and pay her debts in full; and, when the chattel mortgages were given upon her whole stock in trade to secure nearly $5,000, payable in three or four days thereafter, and $1,000 more in less than thirty days, he must have contemplated the entire breaking up of the bankrupt's business, as a thing of course, whenever the pressure of other creditors who had no security—several of whose debts were then past due—should induce the mortgagees, for their own security, to take possession of the property mortgaged.

And he must also have foreseen that the fact, that Mrs. Martin had thus incumbered her whole property, by these mortgages, would cause her unsecured creditors to endeavor to procure payment of their debts, or force Mrs. Martin into bankruptcy, very soon after they obtained a knowledge of the existence of such mortgages.

In the directions for and in the preparation of these mortgages—indeed in everything except the mere formal execution of the mortgages—De Lancey Martin acted for the bankrupt; and his acts, his knowledge and intentions, for the purposes of this case, are, in law, the acts, knowledge and intentions of his principal, the bankrupt. (*Story on Agency*, *secs.* 140, 140 *d.* *and* 451.)

That he, as such agent, intended that these mortgages should secure the payment of the debts of the re-

spondents in preference to the debts of other creditors; and that he procured their preparation and execution in contemplation of the bankrupt's insolvency, is beyond question; and it hardly can be doubted that he then contemplated the subsequent bankruptcy of Mrs. Martin, and actually intended (as the law under such circumstances presumes he intended), to defeat the ordinary operation and effect of the bankrupt law, which secures a *pro rata* division of a bankrupt's property to and among his or her creditors. In short, in view of the special provisions of the bankruptcy Act presently to be noticed, and of its general policy and provisions, as well as of the rule of law that every one must be presumed to intend the natural and usual consequences of his voluntary acts, it must be considered as entirely certain that the execution of the three mortgages to the respondents were acts of bankruptcy and fraud, so far as the bankrupt herself is concerned, and contrary to the provisions of the bankruptcy Act.

The 29th section of the bankruptcy Act provides, among other things, that no discharge shall be granted to a bankrupt if he has *given any fraudulent preference contrary to the provisions of that act*, or made any fraudulent payment, gift, transfer, conveyance or assignment of any part of his estate; or if he has in contemplation of becoming a bankrupt made any pledge, transfer, assignment or conveyance of any part of his property, directly or indirectly, absolutely or conditionally, for the purpose of preferring any creditor or person having a claim against him, or who is or may be under any liability for him, or for the purpose of preventing the property from coming into the hands of the assignee, or of being distributed under the Act in satisfaction of his debts; or if he has been guilty of any fraud whatever contrary to the true intent of the Act.

The thirty-fifth section provides, among other things, that if any person, being insolvent, or in contemplation

of insolvency or bankruptcy, within six months before the filing of the petition by or against him, makes any payment, sale, assignment, transfer, *conveyance* or other disposition of any part of his property *to any person who then has reasonable cause to believe him to be insolvent*, or to be acting in contemplation of insolvency, *and that such payment, sale, assignment, transfer, or other conveyance is made with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under this Act*, or to defeat the object, *or in any way impair, hinder, impede or delay the operation* and effect of, or to evade any of the provisions of this Act, *the sale, assignment, transfer or conveyance, shall be void;* and the assignee may recover the property or the value thereof as assets of the bankrupt; and that if such sale, assignment, transfer or conveyance is not made in the usual and ordinary course of business of the debtor, the fact shall be *prima facie* evidence of fraud.

The thirty-ninth section provides in substance, among other things, that it shall be an act of bankruptcy if any one, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, shall make any payment, sale, conveyance or transfer of money or other property, rights or credits, *with intent to give a preference to one or more of his creditors*, or with the intent, by such disposition of his property, to defeat or delay the operation of the bankruptcy Act; and that if such person shall be adjudged a bankrupt, the assignee may recover back the money or other property so paid, conveyed, sold, assigned or transferred contrary to that Act; *provided* the person receiving such payment or conveyance had reasonable cause to believe that a fraud on this Act was intended, and that the debtor was insolvent; and such creditor shall not be allowed to prove his debt in bankruptcy.

Having already determined that the securities given by the bankrupt must be considered as fraudulent and

void under the provisions of the bankruptcy Act, provided the parties accepting the same had reasonable cause to believe Mrs. Martin was insolvent, and that a fraudulent preference or other fraud on the bankruptcy Act was intended, or that it was intended thereby to defeat the object of or evade any of the provisions of the bankruptcy Act, it becomes necessary to decide whether the respondents had such reasonable cause to believe at the time they took these mortgages; and the question of the existence of this reasonable cause is the most serious and important of those litigated in the present case.

It must be observed that the question is not as to the actual belief of the creditors, but whether they had reasonable cause for the belief specified in the statute; such reasonable cause as would induce the belief in the mind of an intelligent, capable business man.

In respect to Mrs. Savage, there is abundant proof of such reasonable cause. She had, as she herself testified, loaned to the bankrupt, in the fall of 1865, a part of the sum for which the mortgages to her were given, and the greater part in the spring of 1866, taking care to provide that she should have security whenever she required it. Although she could not remember when that loaned in 1865 was agreed to be paid, she testified that it was all to be paid in the fall of 1866, or the early part of the succeeding winter, or before. The evidence shows that no part of it was paid when due, or afterwards, prior to the execution of these mortgages; and the whole had been overdue, without any actual extension of the time of payment, for some eighteen months before the mortgages were given. She understood that payment was not made, because the bankrupt had not the money necessary to make the payment. She frequently asked for payment or security, and, in the spring of 1868, a month or two before the mortgages were given, and after she had learned that the bankrupt was going west, on a visit, she not only asked for, but *insisted* upon, having security. She took

a mortgage upon the whole of the bankrupt's stock of goods, being all the personal property she had, except some $1,500 worth of accounts, &c.; and another upon all her real estate, for as much as such real estate would be likely to sell for, subject to incumbrances, at a forced sale; and the amount secured was, by the terms of these mortgages, to be paid in less than five days afterwards. She lived in the same house with the bankrupt, and was frequently in the bankrupt's store, and, doubtless, saw that the stock on hand was light; and she, or the person who acted for her, knew of the Stark mortgage; and she not only took the mortgage on the stock, but also required one on the real estate also, as further security.

She did this, knowing that the bankrupt had not made any payments upon her debt during the year and a half it had remained overdue, and having good reason to believe that she had not been able to make any considerable reduction in the amount of her debt during that period; and she took these securities on such time, and in such form, as must necessarily break up the bankrupt's business; and must, if her mortgages were valid, give her a secured preference, to the almost entire exclusion of all the bankrupt's creditors, except herself and Stark and those who had their debts secured on the bankrupt's real estate.

The natural, and, indeed, the inevitable effect of thus encumbering the bankrupt's whole property, for the security of the debts of two favored creditors, under the circumstances already stated, was to give such creditors a fraudulent preference; and the creditors were bound to presume, as the law presumes, that the bankrupt intended the natural consequences and effect of her acts.

The facts already stated must be held sufficient to show that Mrs. Savage had reasonable cause to believe that these mortgages were executed with intentions, and under circumstances and conditions, which rendered them

fraudulent and void under the bankruptcy Act, without aid from the provision of the statute which makes them *prima facie* void, because not made and executed in the ordinary course of business. This *prima facie* evidence was alone sufficient to put the party on inquiry, and, taken with the other facts before referred to, must be held conclusive against the validity of these securities. (See *Haughey* v. *Albin*, 2 *Bankrupt Register*, 129; *Foster* v. *Hackley*, *Ibid.*, 131; *Grow* v. *Ballard*, *Ibid.*, 69; *White* v. *Raferty*, 3 *Bankrupt Register*, 3; *Ahl et al.* v. *Thomer*, *Ibid.*, 29.)

If De Lancey Martin must not be considered as having acted as the agent of Mrs. Savage and the respondent Stark, as well as of the bankrupt, in the giving and receiving of the mortgages in controversy, (which is a question not free from doubt,) there is, perhaps, more difficulty in regard to the mortgage executed to the respondent Stark.

In the case of Stark, the mortgage was given without his urging its execution, or even asking for security; and, as he testifies, and all the evidence shows, it was given mainly for the benefit of the brother-in-law of the bankrupt, who was liable, as endorser, for nearly the whole of Stark's debt; and this brother-in-law, it is shown, had been urgent in endeavoring to procure security against his endorsement.

Stark was a banker, and had, for some years, received from time to time a note of the bankrupt, for $1,000, in renewal of a note, of the same amount, previously discounted by him, properly taking care to have its ultimate payment secured by the endorsement of the brother-in-law, Bridgen, who was considered responsible. The bankrupt kept her bank account with Stark, and that account had been overdrawn, for a short time, to the extent of $111, and upwards. Demands against the bankrupt had been sent to Stark's bank for collection, and some had been returned unpaid. The mortgage was

executed to him, and, apparently, for his security; but, regarding himself as entirely secure, by reason of Bridgen's endorsement, he seems to have given the matter but little thought. He, however, testifies, that he supposed the real object in giving the mortgage was to benefit Mr. Bridgen, as he (Stark) had no fears about his debt; that he supposed he authorized Mr. Brown, who drew the mortgage, to draw it; and that he gave him the amount of his account. He swears he did not, at that time, know that Martin was giving security to Mrs. Savage; but Brown, who acted for him, and took the particular security, under such general authority or instruction as he had given him, knew it was to be, or had been given. He also testifies, that he made no inquiry of Mr. Martin, in respect to the state of the bankrupt's affairs; and that he understood the mortgage was taken for the benefit of Mr. Bridgen, so far as the note of $1,000 was concerned.

The mortgage was given nearly a month before the $1,000 note was due, without Stark having asked for such security; it covered the whole of the bankrupt's personal property; it apparently transferred the whole legal title of that property to the mortgagee, leaving only an equitable right of redemption, which right of redemption the creditor could foreclose by a sale after the forfeiture, which took place the day after its execution; it was not given in the ordinary course of business, and was, for that reason, presumed to be fraudulent and void, under the provisions of the 35th section of the bankruptcy Act.

The respondent, Stark, is, I think, chargeable with notice of the mortgages to Mrs. Savage, executed at the same time with his own; and these mortgages, taken together, were fraudulent, and an act of bankruptcy on their face. They were, in substance, conveyances of the whole property of the bankrupt, and, if enforced according to their terms, nothing was likely to be left for her unsecured creditors. In respect to the property of an

insolvent, it may properly be said—to use the language of Lord Mansfield, in *Worsley* v. *Mattos*, (1 *Burrow*, 467):—"A conveyance of a part may be public, fair and honest, but a conveyance of *all* must either be fraudulently kept secret, or produce an immediate absolute bankruptcy." This language is strictly applicable to the present case, and the language of the same judge, in *Wilson* v. *Day*, (2 *Ibid*, 827,) might, with slight variation, be used in this case. Lord Mansfield there said: "This deed is an act of bankruptcy itself. It defeats the whole bankrupt law: nothing remains for the creditors in any shape, but the whole property is put into the hands of his own trustees; therefore, of course, he is a bankrupt the moment he has executed the deed; for there is nothing at all left for his creditors. (See *Grow* v. *Ballard*, 2 *Bankrupt Register*, 69, and authorities there cited.)

The utility and the justice, not to say the necessity, of the provision which renders securities, &c., given out of the ordinary course of business, *prima facie* fraudulent, is well illustrated by the present case. This *prima facie* evidence is present to every creditor who accepts a security in any case to which the provision is applicable; and, unless the creditor has evidence sufficient to repel this legal presumption, he has reasonable cause to believe that the security is fraudulent and void under the bankruptcy Act. This will necessarily prevent any security, voluntarily given by an insolvent to a favored creditor, from being held valid, simply because it proceeded from the voluntary act of the debtor, and was prepared and delivered without any previous communication with the creditor, either in regard to the giving of the security, or the financial condition of the debtor. If a debtor can effectually secure any favored creditor by this one-sided and unusual mode of proceeding, it is likely to be resorted to in every case where the creditor (in consequence of a previous understanding with his debtor, or of the debtor's known disposition to secure

him against loss, to the prejudice of his other creditors,) is willing to rely upon the favorable disposition of his debtor, and to be willfully ignorant of his financial condition; and the salutary provisions of the bankruptcy Act, which were intended to invalidate the unjust preferences, and to prevent all the other frauds growing out of the validity of general or partial assignments, for the benefit of particular creditors, would be evaded and defeated with ease and certainty. This case shows the propriety of the provision, and it is the manifest duty of this Court to give to it the effect which it was the intention of Congress should be given to it.

A creditor cannot, by shutting his eyes when this statutory *prima facie* evidence of fraud is placed before him, escape the consequences of this provision. When he accepts a security, he is conclusively presumed to know what appears upon its face, and to have reasonable cause to believe it was intended to accomplish what must be its ordinary and necessary effect; and no "masterly inactivity," no self-imposed ignorance of what the circumstances call upon him to ascertain, however intense and however closely guarded and carefully cherished that ignorance may be, can make fraudulent preferences, like those attempted to be given in this case, valid and binding, as against the assignee of a bankrupt, while the 35th section of the bankruptcy Act remains in force.

Independent of the provisions of that section, the circumstances of the case were sufficient to put Stark upon inquiry; (*In re Hunt*, 2 *Bankrupt Register*, 166; *In re Wright*, *Ibid*, 154;) and such circumstances and such provisions must be held to render his mortgage invalid.

But it was urged that these securities were not void, because the bankrupt, long before the securities were given, and at the time of the loans by Mrs. Savage, and of Bridgen's endorsement, promised to give security when required, and executed the mortgages, in fulfill-

ment of such promises, under pressure from the mortgagees.

This position cannot be maintained. The provisions of the bankruptcy Act embrace *payments*, for the purpose of giving preference, as well as the giving of securities, &c., and it would hardly be contended that a preference, by way of payment, otherwise invalid, could be valid because the debtor had agreed to pay the debt at the time it was contracted. Besides, the maintenance of the doctrine contended for would defeat the purposes of the bankrupt Act. It would be easy, in every case where it was desired to give a fraudulent preference to a relative, or other favored creditor, to make such a contract for security, when called for; and such agreements would be, in effect, secret liens upon the property of the debtor, and enable him to effect the objects generally effected before the bankruptcy Act, under promises to secure relatives and endorsers against loss in any event, by assignments made for the benefit of such favorite creditors. A preference gained by a creditor, through the acts and co-operation of his debtor, is no less fraudulent and invalid because it was strongly urged upon his debtor. (See *Atkinson* v. *The Farmers' Bank, Crabb's Rep.* 529; *Shawhan* v. *Wherritt*, 7 *Howard*, 641.)

In addition to the objections to these chattel mortgages, which have already been stated, it was insisted that they were fraudulent and void under the laws of this State. There was no immediate or continued change, or, indeed, any change, of possession, for some four months after their execution; and the circumstances of the case tend rather to support than to repel the legal presumption of fraud afforded by the continued possession of the mortagor. But the conclusions already reached render it unnecessary to decide whether these mortgages were void under the laws of the State, or whether the assignee in bankruptcy, appointed under proceedings commenced after possession of the mort-

gaged property was taken by the mortgagees, can avail himself of the fact that there was no such immediate or continued change of possession.

A decree must be entered for the petitioner.

Charles G. Judd, Esq., for assignee in bankruptcy.

D. Morris, Esq., for Stark.

D. B. Prosser, Esq., for Mrs. Savage.

Southern District of New York,

DECEMBER, 1869.

SIX CASES OF SILK RIBBONS, &c.

UNDERVALUATION.—MARKET VALUE.—EVIDENCE.

Under the Act of March 3d, 1863, (12 Stat. at Large, 737,) where goods imported from abroad are owned by their manufacturer, he must swear that his invoice contains the actual market value of the goods at the time and place when and where they were manufactured.

"Actual market value," is the price at which the manufacturer holds his goods for sale in the ordinary course of trade.

The time when an article is manufactured is when its manufacture is completed.

The law presumes that there was, at such time and place, an actual market value, and no evidence can be received, in an action to forfeit the goods for fraudulent undervaluation, to show that there was no such value.

The law requires the best evidence to be given of any fact.

A series of sales or a single sale in the ordinary course of trade, is one of the best evidences of market value.

Offers by merchants or manufacturers to sell their goods in the usual course of trade are among the best evidences of their market value.

In an action to forfeit goods for fraudulent undervaluation, the jury have the right, in the absence of proof of such sales or offers, to resort to the cost of manufacture. with the manufacturer's profit added, as a means of determining

what was their actual market value. But, in that case, the cost of the raw material is to be taken as of the time and place of manufacture.

Any intentional undervaluation is cause for the forfeiture of the goods; and the intentional undervaluation of any item in an invoice authorizes the forfeiture of the whole invoice.

Where the Court decides that probable cause has been shown for the seizure of the goods as so forfeited, the burden is upon the claimant to show that the invoice contains the actual market value of the goods.

CHARGE OF JUDGE BLATCHFORD TO THE JURY.—This prosecution, gentlemen, for the forfeiture of the goods in question here, is founded upon two statutes of the United States—the fourth section of the Act of May 28th, 1830, (4 *U. S. Stat. at Large*, 410,) and the first section of the Act of March 3d, 1863, (12 *Id.*, 737.) The substance of the Act of 1830 is, that if the invoice upon which foreign goods are entered at the custom-house is made up with intent, by a false valuation, to evade or defraud the revenue, the goods shall be forfeited; and the substance of the Act of 1863 is, that if any owner of any imported goods shall knowingly make, or attempt to make, an entry thereof by means of any false invoice, or of any false paper, or of any other false practice or appliance whatever, all the goods named in the invoice shall be forfeited to the United States.

At Basle, in the Swiss Confederation, there has existed, for a long series of years, a manufacturing and mercantile house, doing business under the name of Forcart Weiss and Burkhardt Wildt, composed, at present, of three partners, Daniel Burkhardt, Daniel Burkhardt Forcart, and Louis Burkhardt Forcart. These gentlemen are engaged in the manufacture of silk ribbons, and they dispose of a large portion of their manufactures by sending them on consignment to the United States, to the city of New York, for sale here by a mercantile house—Kutter, Luckemeyer & Co. They have pursued this business of sending their goods to New York, to this house, and its predecessors, for

about twenty-seven years. The law on the subject of invoicing foreign goods, in a case of this kind, is very explicit. As these goods were sent here by the persons who manufactured them, on consignment, for sale on their account, the proceeds to be returned to them, and were not actually sold abroad, the law requires that the invoice shall contain the actual market value of the goods at the time and place when and where they were manufactured. In the present case, in compliance with the law and the instructions from the proper authorities of the United States, one of the partners of this house has made oath, as required by the Act of March 3d, 1863, that the invoices contain the actual market value of the goods at the time and place when and where the same were manufactured. The definition of the words "actual market value" has been read to you from the decision made by the Supreme Court of the United States in the case of *Cliquot's Champagne*, (3 *Wallace*, 114.) The definition is, that the words "actual market value" mean the price at which the manufacturer holds his goods for sale, the price at which he freely offers them in the market, the price which he is willing to receive for them if they are sold in the ordinary course of trade. That is a definition which commends itself to the good sense of every man. A manufacturer who sends his goods to this country under the circumstances under which the goods in this case were sent, has no right to substitute, in his invoice, anything else for the actual market value. The oaths in this case are, that the invoices contain the actual market value; and the question will be, in the first place, whether these invoices contain the actual market value of these goods at the time and place when and where they were manufactured, and, in the next place, if they do not, whether they were made up by these manufacturers with the intent to evade and defraud the revenue

of the United States, or with a knowledge on their part that they did not contain such actual market value.

There are seven invoices involved in this case, the first of them dated on the 6th of July, 1866, and the last of them on the 28th of August, 1866, covering a space of fifty-three or fifty-four days. The Government claims to have shown to you, by the evidence, that there is, in fact, an undervaluation in these invoices, or, in other words, that these invoices do not contain the actual market value, in respect to five different descriptions of ribbons—what are known as patterns 350, 351 and 261, taffetas unis, and satins unis L. There are some ribbons of pattern 350 in every one of the seven invoices; and the law is, that if there is a knowing undervaluation in respect to any one item in any invoice, all of the items and goods in that invoice are to be forfeited to the United States, as well as the item in respect to which such undervaluation exists. Of pattern 351 there are some only in invoices 1 and 2; of pattern 261 there are some only in invoices 2, 4, 6 and 7; of taffetas unis there are some only in invoices 1, 2, 3 and 6; and of satin unis L there are some only in invoices 1, 3, 6 and 7.

The expression "actual market value" having been defined to you, there is only one other term in the statute that requires any explanation or definition. The statute requires that, when the goods are obtained in any other manner than by purchase, the invoice shall contain the actual market value thereof at the time and place when and where the same were procured or manufactured. In this case, it must be the actual market value at the time and place when and where the goods were manufactured. The time when an article is manufactured means, under this law, the time when its manufacture is completed—when it is in a condition to have, as a complete manufactured article, a market value; and it does not mean any other preceding stage in the process of manufacture. The testimony of Mr. Daniel

Burkhardt is, that these goods were in that state of complete manufacture from one to two weeks prior to the dates of the several invoices. From these views, you will perceive why it is that the law, which requires such actual market value to be inserted in the invoice, does not and will not permit anything else to be inserted in place of such actual market value. It will not permit the actual cost of the goods, with a manufacturer's profit added, to be inserted in the invoice instead of the market value; and this case furnishes an illustration of why such a principle, under this law, never could be admitted. It appears, from the evidence on both sides, that the cost of the raw silk used in the manufacture of these ribbons enters so largely into the expense of manufacturing them, as to constitute from seventy to eighty per cent. of the entire expense of their manufacture, the cost of the dyeing and weaving, and other expenses, in an old settled country, such as Switzerland, being, as a general rule, a fixed sum; that the variation in the cost of manufacture depends upon the variation in the price of raw silk; that, in consequence of the war between Austria and Prussia, in the summer of 1866, there being an interruption of trade, and the demand for ribbons being less, there was a fall in the price of raw silk; and that, after the war closed, in July, 1866, raw silk advanced, because of the prospect of a market for ribbons. Now, if the claimants in this case bought raw silk at its lowest price in May or June, and out of such silk manufactured ribbons, but did not have them completed and ready for market until after the 8th of August, when the witnesses, Mr. Farwell and Mr. Viollier, were at Basle, and by which time the price of raw silk had advanced to a point from twelve to fifteen per cent. higher than its lowest price in May or June, and if the claimants afterward made out invoices of such ribbons, upon the basis of their cost, as made of the raw silk bought at such lowest

price in May or June, you will perceive that the cost of the goods so arrived at would not and could not represent their market value at the time when they became a completed manufacture, which is what the law of the United States requires. It would represent the cost of the goods to the manufacturer, undoubtedly, because he was fortunate enough to procure his raw silk when it was low, and to have a market for his manufactured goods some time afterwards, at a price for those goods based upon an increased price of raw silk. This case, therefore, furnishes a complete illustration of why the United States can never admit that a manufacturer shall invoice his goods at their cost to him with a profit added —at the price that he paid for the raw silk which he puts into the particular goods, with the other expenses of manufacture and a profit added. If any such principle of valuation were to be admitted by the United States, as cost with a profit added, the cost that the United States would have a right to insist upon, in a case like the present, would be a cost based upon a price for raw silk at the advanced rate at which it stood when the goods were completely manufactured, ready for market; otherwise, the United States would be defrauded of its just revenue. But it is not the law that an individual has any right whatever, under any circumstances, to substitute, in his invoice, for the actual market value, cost with a manufacturer's profit added. He must put in the actual market value.

How is the market value to be arrived at? There are three sources of evidence, which have been laid before you by the two parties to this controversy. One source of evidence is actual sales at Basle. Another source is, offers to sell at Basle, made by these manufacturers, to individuals seeking to purchase. A third source of evidence is the cost of the goods, with a manufacturer's profit added. It is in evidence, that the claimants had been in the habit, for some period before

the date of the first invoice in question here, the 6th of July, of invoicing to Kutter, Luckemeyer & Co., at New York, goods of the same patterns, qualities, styles, and general assortment with the goods under seizure, at the same prices that are found in the invoices of the goods seized; and I believe that the prices in these seven invoices do not vary at all from each other, for the same quality of goods.

The evidence in regard to actual sales of these goods, as a basis of ascertaining their actual market value, at the time and place when and where they were manufactured, and the manufacture of them was completed, consists, in this case, of three sales, made at Basle, by the claimants—one to a person by the name of Mitschke, residing at Riga, in Russia; another to a German merchant at Leipsic, by the name of Kettembeil; and a third to Tobin, Dixon & Davisson, of San Francisco. You have heard the evidence and the arguments of the counsel for the respective parties in regard to these various sales. I shall not recapitulate the evidence. It is claimed, on the part of the Government, that, as compared with the prices charged by the claimants on the sale to Tobin, Dixon & Davisson, of taffetas unis, and satins unis L, the same kinds of goods are undervalued in the invoices involved in this suit—the taffetas unis, to the extent of $12\frac{8}{10}$ per cent., and the satins unis L, to the extent of 18 per cent. The manner of making the comparison, and the basis and grounds of it, you have heard discussed by the counsel on both sides. So, also, as compared with the prices charged to Mitschke, it is claimed, on the part of the Government, that there was a large undervaluation in the invoices in this suit, and some undervaluation, also, as compared with the prices charged to Kettembeil.

The second class of evidence consists of offers made by Forcart Weiss and Burkhardt Wildt, to sell ribbons at Basle, which are claimed to be like ribbons, in quality

and value, and merchantable worth at Basle, with the ribbons in these invoices, those offers being contained in the letters which have been read to you. One was an offer, made in writing, on the 8th of August, 1866, at the time that Mr. Farwell and Mr. Viollier visited the establishment of the claimants, at Basle. In the letter, which the claimants then and there wrote and delivered to Mr. Farwell, they say: "In answer to your request, we have the honor to hand you, herewith, some samples of our three qualities," that is, qualities 350, 351, and 261, "taffetas a lisieres," that is, taffetas with edges, "the prices of which are below. Trusting that our offer, which we have based upon the lowest prices of the raw material, will induce you to give us an experimental order, we present to you, sir, our respectful salutations." Subjoined to the letter are the prices of each of the patterns, 350, 351, and 261, for each of the various widths, the price being stated for each piece of 14.40 metres in length, with a deduction to be made, of 24 per cent., as "bonification d'aunage," or allowance for difference of measure, to reduce the price to the price for each piece of 11 metres, or 12 yards, in length, because the pieces were to be put up in pieces 11 metres in length, instead of 14.40 metres in length. There was, also, to be a further discount, of 20 per cent., and the price was to be payable in three months, with an allowance of 2 per cent., for payment within thirty days of the date of the invoice, an acceptance on Paris to be given, and the goods sent free to Havre. Next, you have the letter of the claimants, addressed and sent by them to Mr. S. D. Jones. Mr. Farwell, over the signature of Samuel D. Jones, wrote, at Geneva, a letter, addressed to the claimants, at Basle, and dated Lyons, August 27th, 1866, and forwarded it to Mr. Viollier, at Lyons. Mr. Viollier posted it at Lyons. It reached the claimants at Basle, and their answer to it, addressed to Mr. S. D. Jones, at Lyons, and dated at Basle, August 30th, 1866,

was sent to Lyons, through the post office, and was received by Viollier, and was sent by him, with its contents, which consisted of the letter, and of the samples of ribbons referred to in it, to Farwell, at Geneva. In the letter of the 27th of August, to the claimants, the writer says: "Being on my first visit to Europe, for the purpose of purchasing goods for the market in California, I am desirous of comparing the qualities of Basle ribbons, of the cheapest kinds of taffetas unis, with St. Etienne goods." Taffetas unis is a quality of ribbon not mentioned in the letter of the 8th of August, from the claimants to Farwell. "I shall be in Basle at the close of next week, or early the week after, and hope then to have the pleasure of visiting your house, and perhaps doing some business with you. In the mean time, will you have the kindness to forward to me samples, and your lowest cash prices, for, say, three or four of your lowest qualities of taffetas unis and a lisieres, suitable for country trade in California, in order that I may examine and compare them with others here, and so satisfy myself as to which is the best market for me to purchase in. On my visit to Basle, if I find it possible to do some business with your house, I will furnish you with my references, which will be found satisfactory. Be kind enough to let me know how early you could fill an order for from four hundred to five hundred cartons, in case I should conclude to purchase. Please address me, poste restante, at Lyons." In answer to that letter, the claimants addressed and sent to Mr. S. D. Jones, at Lyons, the letter dated Basle, August 30th, 1866, in which they acknowledge the receipt of his letter of the 27th of August, and say: "According to your demand, we have the pleasure of handing you, enclosed, samples of our two qualities in taffetas unis, and two qualities taffetas a lisieres, whose actual very lowest prices you will find at the foot of the present letter. As we suppose that you will sufficiently know the actual standing of the silk market,

when the prices of raw silk are going higher from day to day, you will please to observe that, under those conditions, we cannot engage ourselves to keep you our very lowest prices for some time. To fill an order of 400 to 500 cartons, would require at least two months, as those goods are not ready on hand, but are to be manufactured expressly on order. Expecting your kind visit for next week, we shall be glad to hear from you, that our offers will give you occasion to a satisfactory business." Appended to this letter, were the prices of two qualities of taffetas unis, and of patterns 350 and 351, for the various widths of each, for pieces 14.40 metres in length, with 20 per cent. discount, payable at three months, with an extra discount of two per cent., for cash, goods free to Havre. It is claimed, on the part of the Government, that the prices stated by the claimants, in these letters of the 8th of August and the 30th of August, are considerably higher than the prices stated in the invoices of the goods under seizure, for articles of like description, quality, pattern, and value.

If you believe, from the evidence, that the claimants, when they wrote those letters, and delivered or sent them to Mr. Farwell or Mr. Jones, believed that Mr. Farwell and Mr. Jones, respectively, came to them as customers, in good faith, intending to purchase ribbons, and if you believe that the offers made by the claimants, in these letters, were *bona fide* offers to sell the goods named therein, upon the terms named therein, you have a right to regard such offers, if they refer to goods like those under seizure, as evidence to be taken into consideration by you, in determining the question of the actual market value of the goods under seizure, at the time and place of the manufacture of those goods.

The law, in all departments of its administration, in courts of justice, always requires the best evidence to be produced of any fact. In regard to the actual market value of merchandise abroad, a series of sales, general

in their character, not accompanied by any exceptional circumstances, tending to make any one or more of such sales higher or lower than it would be but for such exceptional circumstances, or even a single sale, in the ordinary course of trade, is one of the best evidences of market value. So, also, offers by merchants or manufacturers to sell their goods to persons who are supposed by them to come as buyers, in good faith, such offers being made in the usual course of trade, under such circumstances as generally attend the sale of merchandise, are among the best evidences of the actual market value of the goods in respect to which the transactions take place. It is only when such evidence is wanting, in a case of this kind—it is only when you are unable to arrive at the actual market value of the goods, from actual sales of similar goods about the same time, or from offers to sell, made under the circumstances which I have specified as necessary, in respect to the same goods, or goods of the same quality, that you have a right to resort to an inferior class of evidence, as evidence of market value—that is, to the cost, with a manufacturer's profit added. But, as I said before, if, in this case, you shall consider that there is no evidence of actual sales, at Basle, of goods like those under seizure, and no evidence of offers by the claimants to sell, at Basle, similar goods, from either of which you can arrive at a conclusion as to the actual market value, at Basle, of the goods in the invoices in question, and if you shall then have to resort to the cost of the goods, with a manufacturer's profit added, you will not be authorized to compute such cost on the basis of the cost of the raw silk to the claimants, if you shall find that the claimants were paying for raw silk a higher price, at the time of the completion of the manufacture of the goods, than the actual cost to them of the same quality of raw silk, which went into the manufacture of such goods. The Government is not bound to accept such low cost of the raw material.

It is entitled to the benefit of the price of the raw material at the time when the goods were completed in their manufacture.

It results, therefore, that if the invoices, or any of them, of the goods under seizure, were made up by the claimants with an intent, by a false valuation of the goods described in them, to evade the payment of any part of the duties chargeable by law thereon, the goods contained in any invoice so made up are forfeited, and your verdict must be for the United States, as to such invoice. So, too, if you shall find that the goods seized, or any of them, were entered by means of an invoice which did not truly state the actual market value of the goods, or of any of them, named therein, at the time and place when and where the same were manufactured, with the knowledge, on the part of the claimants, that such invoices did not contain such actual market value, all the goods so entered are forfeited, and your verdict must be for the United States. There are, therefore, two questions for your consideration. You will, in the first place, inquire whether the actual market value was, in point of fact, higher than the value stated in the invoices to be such market value. If you shall find that it was not, and that the invoices were not undervalued, your verdict will be for the claimants. But, if you shall find that the invoices were too low, you will have to go into a further inquiry, whether such undervaluation was made, on the part of the claimants, knowingly, or with an intent to evade or defraud the revenue of the United States. If you shall find that it was not, your verdict will be for the claimants. But, if you shall find that it was, your verdict will be for the United States.

The market value to which the claimants were required to conform the valuation in their invoices, was the actual market value of the goods, or of goods of the same description and quality, at Basle, at the time of the completion of the manufacture of the goods, which

was, according to the testimony, within a week or two before the date of each invoice. The law presumes that there was, at the time and place of the manufacture of the goods seized, an actual market value thereof; and no evidence can be received or considered, under the law, and under the oaths to the invoices, to show there was not, in fact, such actual market value thereof. The cost of the goods will come under consideration, if at all, not as a substitute for market value, but merely as an item of evidence on the question as to what was the actual market value. Therefore, you must assume, in this case, that there was an actual market value for these goods, at the time and place of their manufacture, the only question being to ascertain what such actual market value was. The claimants had no right to adopt any other standard of value than such actual market value, nor do I understand them as claiming that they had such right. They have sworn, in the oath on each invoice, that such invoice contains the actual market value; and their claim is, not that they had a right to set forth anything except the actual market value, but that the actual market value was the cost, with the manufacturer's profit added, at the percentage named in the testimony, and that such actual market value was no greater, according to their idea of actual market value. So, also, the claimants were required to state, in their invoices, the actual market value of their goods, at the time and place of their manufacture, not only without regard to the cost thereof, but without regard to the profit or loss which might result from their consignment thereof, or any loss which may be shown, in the end, to have resulted therefrom. If they chose to take the cost, and add a profit, and made up the actual market value in that way, and it turns out, in the end, that that is the actual market value, very well; but, if it turns out, in the end, that that is less than the actual market value, the claimants cannot maintain, under the law, that they had a right to put in place

of the actual market value, the cost, with the manufacturer's profit added. Nor is the manufacturer relieved or excused from stating in his invoice such actual market value, or justified in adopting any other standard of value, because he may not himself make sales at home of similar goods, but may consign all such goods for sale to foreign markets. Although he may adopt such course of trade, he is, nevertheless, required to state, in his invoices, the actual market value of such goods, at the time and place of their completed manufacture; that is, the price at which he holds such goods for sale, at such time and place, the price at which he, then and there, freely offers them in the market, such price as he is, then and there, willing to receive for them, if they are sold in the ordinary course of trade. As I stated to you before, but perhaps not quite fully enough, you must, in considering the question of individual sales of similar goods, such as the sales to Mitschke, Tobin, Dixon & Davisson, and Kettembeil, inquire whether they were made in the ordinary course of business, or whether the circumstances under which they were made were such as to make them sales exceptional in character, and not a fair index of actual market value. So, in regard to offers to sell goods, such as are contained in these letters of the 8th and 30th of August, they are competent evidence, from which you may find actual market value, if you shall believe that they were fair ordinary business offers, made in good faith, and under the belief, on the part of the claimants, that the party to whom they were made was intending to become, and might become, a purchaser; and the circumstance, that the party to whom they were made did not, in fact, intend to purchase, is wholly immaterial. The question is, the state of mind, and the belief and intent, of the claimants, not what was intended by Jones or Farwell. The test is, whether the claimants believed that Farwell and Jones

came to them in good faith, intending to become purchasers.

In determining the question of knowledge or intent, on the part of the claimants, in the undervaluation of their goods in the invoices, if you shall find that such undervaluation was made, the question for consideration will be, whether such undervaluation was made knowingly, that is, with a knowledge, on the part of the claimants, that the value stated ought to have been higher, in order to be the actual market value, or designedly, or whether it was the result of honest mistake, or an accident. If you shall find that it was made knowingly, or designedly, your verdict must be for the United States; otherwise, for the claimants. So, also, if you shall find that the claimants knowingly or designedly stated, in any invoice, a value less than the actual market value, knowing what that actual market value was, and that it was greater than the value stated in the invoice, it makes no difference as to what was the motive, or the reason, or the process of reasoning, on the part of the claimants, upon or by which they arrived at the value stated in the invoice.

It is the law, and has been ever since the year 1799, that, in cases of this kind, where the Court decides that probable cause is shown for the seizure of the goods, the burden of proof is upon the claimant to clear up the suspicion thrown around the case, and to show that the invoice contains the actual market value of the goods. In the present case, the burden of proof is upon the claimants, to show affirmatively, by evidence satisfactory to you, either that the goods seized were, in fact, invoiced at their actual market value, or, in case they were not so invoiced, that the undervaluation was not made knowingly, or with a design to evade or defraud the revenue, but was made by an honest mistake or by an accident. If, upon the whole evidence, the claimants have not proved, to your satisfaction, either that

the goods were invoiced at their actual market
that the failure to so invoice them was the re
honest mistake, or of an accident, your verdi
for the United States; otherwise, for the c
Any undervaluation, however small, made kn
intentionally, will entitle the Government to
dict, and any undervaluation so made, in resp
one item in any invoice, will authorize a forfe
the goods contained in the same invoice.

The questions of fact in this case, which
so elaborately argued by the counsel on bo
shall leave entirely to your consideration.
questions exclusively for you, under the ru
which I have stated. Impressing upon y
portance of this case to the United States,
to the principles involved in it, and remi
of the equal duty, that is incumbent upo
stand between the United States and indiv
dent abroad, if they have made an hones
looking, as they do, equally with the Gov
you and to your action for shield and prot
satisfied that you will give to the case pati
tentive deliberation, and apply it to the rules o
I have laid down, I commit it to your arbitra

The jury were discharged, without havin
to agree on a verdict.

William M. Evarts and *William G. Cho*
United States.

Edwin W. Stoughton and *Sidney Webs*
claimants.

DECEMBER, 1869.

A QUANTITY OF DISTILLED SPIRITS, &c., FOUND IN THE RECTIFYING HOUSE OF A. O'NEILL, No. 133 MOTT STREET.

INTERNAL REVENUE ACT OF JULY 20TH, 1868.—CANCELLING STAMPS.—RECTIFIER'S BOOKS.—KNOWING AND WILFUL NEGLECT.

Empty barrels were found on the premises of a rectifier, on which were stamps which had not been cancelled as required by the 43d section of the Internal Revenue Act of July 20th, 1868 (15 Stat. at Large, 125):

Held, That if the rectifier knew that the stamps were not cancelled, and it was his will, freely exercised, that they should not be cancelled, when the barrels were emptied, then he had "knowingly and wilfully" neglected to comply with the 43d section, and, under the 96th section of the same Act, all distilled spirits or liquors owned by him were forfeited.

A rectifier must himself make the entries in the book required by the 45th section of the same Act, and his failure to do so subjects him to a similar penalty.

CHARGE OF JUDGE BLATCHFORD TO THE JURY:—This case, which is now to be submitted to your consideration, is one involving very important questions under the internal revenue laws of the United States. It is the first case that has come before this Court under the Act of July 20th, 1868, (15 *U. S. Stat. at Large*, 125,) and it concerns the construction of the 96th section of that Act, which is an exceedingly important section in reference to the interests of the Government, and of those engaged in distilling, rectifying, and dealing in liquors and in manufacturing cigars, however it shall be construed.

The charge in this case against the property seized, which was found at the establishment of Mr. O'Neill in Mott street, comes up under two sections of this Act of

1868—the 43d section and the 96th section. The property was seized on the 17th of April, 1869, and, with reference to the questions involved in this case, it must be divided into three lots or parcels. The first lot consists of the empty barrels found on the premises, with tax paid stamps thereon not effaced or obliterated. The second lot consists of the distilled spirits and liquors found there, owned by Mr. O'Neill. The third lot consists of the property found there other than the empty barrels and the distilled spirits and liquors. This property, as appears by the records of this Court, has, all of it, been delivered up, on appraisement, to the claimant, the Government accepting voluntarily, through the consent of the District Attorney, in place of the property seized, what it regarded as satisfactory bonds therefor.

Under the evidence in this case, there is no doubt, upon the law, as the Court will lay it down to you, that the empty barrels must be condemned. There is, also, no doubt that the property seized other than the empty barrels and the distilled spirits and liquors must be released. That property, by the inventory, amounts to the sum of $173.65, consisting of forty-two standing casks, two reservoirs, two pumps, one safe, ninety-four demijohns, and five empty kegs; and, in respect to that, your verdict must be for the claimant. In respect to the empty barrels, your verdict must be for the United States. The only question in dispute is as to the distilled spirits and liquors, which appear, by this appraisement, to have been appraised at a very few dollars differing from $4,700, embracing all the liquors found there, not merely the distilled spirits, but a quantity of wine also.

The condemnation of the distilled spirits and liquors, embracing the wines, is sought under the 96th section of the Act, which provides that, if any distiller, rectifier, wholesale liquor dealer, or compounder of

liquors, shall knowingly and wilfully omit, neglect, or refuse to do or cause to be done any of the things required by law in the carrying on or conducting of his business, or shall do any thing prohibited by the Act, if there be no specific penalty or punishment imposed by any other section of the Act for the neglecting, omitting, or refusing to do, or for the doing or causing to be done, the thing required or prohibited, he shall pay a penalty of one thousand dollars, and all distilled spirits or liquors owned by him, or in which he has any interest as owner, shall be forfeited to the United States. You have heard the discussion by the counsel representing the Government and the counsel representing the claimant in regard to the interpretation of this section, and also the suggestions made by the Court in the course of the trial, respecting the proper interpretation of it. The views so suggested, I shall now repeat, as they are important, not merely with reference to this case, and to your action upon it, but with reference, also, to other cases and to the law generally. This 96th section provides, that if a rectifier, wholesale liquor dealer, or compounder of liquors —(and it is undisputed that Mr. O'Neill was a wholesale liquor dealer, and had paid the proper special tax to become so)—shall knowingly and wilfully omit, neglect, or refuse to do, or cause to be done, any of the things required by law in the carrying on or conducting of his business, or shall do anything prohibited by the Act, if there be no specific penalty or punishment imposed by any other section of the Act, for the neglecting, omitting, or refusing to do, or for the doing or causing to be done, the thing required or prohibited, he shall pay a penalty of one thousand dollars. The language is marked. In the first place, it imposes this penalty of one thousand dollars only for a knowing and wilful omission, neglect, or refusal, in case there is no specific penalty or punishment imposed by any

other section of the Act, for the neglecting, omitting, or refusing—not for the knowingly and wilfully neglecting, omitting, or refusing, but for the mere neglecting, omitting, or refusing—to do the things required or prohibited by law. Therefore, the meaning of the section, thus far, is, that if no specific penalty or punishment is imposed by any other section of the Act, for the mere neglect, omission or refusal, whether wilful and knowing or not, then, if the individual is guilty of a knowing and wilful omission, neglect, or refusal, he shall pay a penalty of one thousand dollars. In other sections of the Act, Congress has provided various penalties and punishments for mere neglects, omissions, and refusals, without reference to whether they are knowing and wilful or not. It now provides a general enactment, in which it says, in effect: "We have imposed various penalties and punishments for neglects, omissions and refusals to do various things; but, if there be anything prohibited, or prescribed as necessary to be done, for the neglect, omission, or refusal to do which, or for the doing of which, we have not already provided penalties and punishments, we here declare, that we do not intend to impose any penalty or punishment for such mere neglect, omission, refusal, or doing; but if, in respect to any such thing, there has been any knowing and wilful neglect, omission, refusal, or doing, for that we impose a penalty of one thousand dollars." That is the plain meaning of this section, thus far. It then goes on to say, that, in addition, if the individual is guilty of such knowing and wilful omission, neglect, refusal, or doing, he shall therefor, if he is a distiller, rectifier, wholesale liquor dealer, or compounder of liquors, forfeit all the distilled spirits and liquors owned by him, or in which he has any interest as owner. He does not forfeit the vessels used by him in his business, but he forfeits only distilled spirits and liquors. Now this is not at all an unusual provision in the internal

revenue laws of the United States. On the contrary, this provision, in the Act of 1863, is very much mitigated from the provisions of the Act of March 2d, 1867. The 25th section of that Act, (14 *U. S. Stat. at Large*, 483,) contained provisions much more stringent than the provisions of this 96th section of the Act of 1868. It provided, that the owner, agent, or superintendent of any still, boiler, or other vessel used in the distillation of spirits, who should neglect or refuse to make true and exact entry and report of the same, or to do or cause to to be done any of the things by law required to be done concerning distilled spirits, should, in addition to other fines and penalties then by law provided, forfeit, for every such neglect or refusal—whether wilful or not, whether with the intent to defraud the Government or not—all the spirits made by or for him, and all the vessels used in making the same, and the stills, boilers, and other vessels used in distillation, and all materials fit for use in distillation, found on the premises, together with the sum of five hundred dollars for each offence, to be recovered with costs of suit, and should be deemed guilty of a misdemeanor, and be subject to imprisonment for a term not exceeding one year. Therefore, the 96th section of the Act of 1868, while preserving the principle of the forfeiture of property, very much mitigates the provisions of the Act of 1867. Under this 96th section, if Mr. O'Neill, being a wholesale liquor dealer, has knowingly and wilfully neglected, omitted or refused to do or cause to be done, any of the things required by law in the carrying on or conducting of his business, all the distilled spirits and liquors owned by him, or in which he has any interest as owner, are forfeited to the United States; and such distilled spirits and liquors, being seized and prosecuted in this case, are to be condemned, provided the facts are found to exist which the 96th section requires to exist in order to warrant such forfeiture.

It is alleged, on the part of the Government, that O'Neill, being a wholesale liquor dealer, knowingly and wilfully omitted, neglected and refused to do two several things required by law to be done by him in the carrying on or conducting of his business. It is alleged, in the first place, that he omitted and neglected to do what he was required by the 43d section of this same Act to do in regard to the carrying on of his business. That section provides, that it shall be the duty of every person who empties or draws off, or causes to be emptied or drawn off, any distilled spirits from a cask or package bearing any mark, brand, or stamp required by law, at the time of emptying such cask or package, to efface and obliterate such mark, stamp, or brand. At the first blush this might seem to you to be a very trifling matter. What difference does it make whether or not this obliteration is done at the moment of emptying the barrel? What difference does it make when it is done, provided O'Neill does not part with the barrel to anybody else, or sell it, or suffer it to go out of his possession, until he has effaced and obliterated the stamp? The nature and purpose of the provision are shown by the further language of this same 43d section, which shows the importance that Congress attaches to this matter. This "stamp" on a barrel, of which you have heard so much in this case, is the mode by which the Government now collects a tax, to the amount of fifty cents per gallon, on distilled spirits. On a barrel full of spirits, a stamp, indicating that the tax upon such barrel of spirits has been paid, represents to the Government the sum of about twenty dollars. Where the tax on a barrel of spirits has been paid, and the tax-paid stamp has been legitimately put on such barrel, if the spirits are taken out of it, the empty barrel remains, with the stamp upon it, indicating that the tax has been paid; and, if some other spirits, on which no tax has been paid, can be illicitly put into that barrel, which thus has a tax-paid

stamp upon it, such barrel can be put into the market, carrying with it the index that the tax on the spirits therein has been paid, and the chances are ninety-nine in a hundred that the Government will be defrauded, on every such barrel of spirits, out of the sum of twenty dollars. The sense that Congress had of this danger is shown, as I have said, by the further provision of the 43d section: "Any person who shall fail or neglect to efface and obliterate said mark, stamp, or brand, at the time of emptying such cask or package, or who shall receive any such cask or package, or any part thereof, with the intent aforesaid, or who shall transport the same, or knowingly aid or assist therein, or who shall remove any stamp provided by this Act from any cask or package containing, or which had contained, distilled spirits, without defacing and destroying the same at the time of such removal, or who shall aid or assist therein, or who shall have in his possession any such stamp so removed as aforesaid, or have in his possession any cancelled stamp, or any stamp which has been used, or which purports to have been used, upon any cask or package of distilled spirits, shall be deemed guilty of a felony, and, on conviction, shall be fined not less than five hundred dollars nor more than ten thousand dollars, and imprisoned not less than one year nor more than five years." There is, as you perceive, no discretion given to the court whether to fine or imprison for the offence. The offender must be fined and also imprisoned not less than one year nor more than five years. Why this severe penalty? Because the matter of the offence is a vital one, under the law. The essence of the requirement is, that the stamp shall be effaced and obliterated at the time any distilled spirits are emptied or drawn off from the cask or package, so that there shall be no opportunity given for the commission of fraud, and so that the empty casks or packages, with the unobliterated and uneffaced tax-paid stamps upon them, shall not be

suffered to lie exposed in the public street, as was the practice at Mr. O'Neill's establishment, according to his own testimony, where they may be stolen, or be put into a shed, as in this case, whence they may be carried away, either with or against the will of their owner. The law requires that no opportunity shall be offered for a second use of the tax-paid stamps. Therefore, it is of no consequence, under this section, what the intent of Mr. O'Neill was. It is of no consequence that he himself never sold an empty barrel, or parted with one, until he had obliterated the stamps upon it. It is of no consequence that he had no intent to defraud the revenue himself, in not obliterating the stamps, if he knowingly and wilfully omitted to obliterate them.

The next question is—what is meant by the words "knowingly and wilfully," in the 96th section? They do not mean, as was argued to you by the counsel for the claimant, that the person must be shown to have known what the law was and to have acted wilfully against it. Every man is presumed and must be held to know the law. The question is not, whether Mr. O'Neill omitted to obliterate the stamps knowing or not knowing what the law was. The question, is whether he knew the fact that the stamps were not obliterated, and whether it was his will and pleasure, freely and voluntarily exercised, that they should not be obliterated, at the time the contents of the barrels were drawn off from them. You will observe that the language of the 96th section is "knowingly *and* wilfully," not "knowingly *or* wilfully." A person might empty the contents of a barrel of spirits, and, at the very instant after that was done, and before he had time to obliterate the stamp, another person might steal and carry away the barrel. In that case, the person who emptied the spirits from the barrel would know that the stamp had not been obliterated at the time of emptying the barrel, but the omission to obliterate the stamp would not be a wilful

act on the part of such person. The law says that the omission or neglect must be both knowing and wilful.

Mr. O'Neill, in his testimony, states very frankly, that he did not pretend, in any case whatever, to obliterate any tax-paid stamp on any emptied barrel until he came to sell such barrel. He tells you that it was his regular habit not to obliterate the stamps at the time of emptying the barrels. The empty barrels which were found on his premises were full of spirits when they were brought upon his premises, and such spirits were emptied therefrom on his premises. The stamps on the barrels were not obliterated at the time such spirits were emptied. On that testimony, it is for you to say whether Mr. O'Neill knew that the stamps on the barrels were not obliterated or effaced when the contents of the barrels were emptied, and whether it was an act of his free will that they were not then obliterated and effaced. If so, then his neglect and omission to do what the 43d section required him to do, was a knowing and wilful neglect and omission. The question of his intent in respect to the future disposition of the barrels has nothing to do with the case. No man has a right to set up a construction of the law for himself. No man has a right to furnish an opportunity to others to steal from his possession emptied spirit barrels with unobliterated tax-paid stamps on them, and to fill them with spirits on which the tax has not been paid. It is his duty to obliterate the stamps at the time the contents of the barrels are emptied out. The only question for your consideration is, whether O'Neill knew the fact that the stamps had not been obliterated, and whether his omission to obliterate them was an act of his will or was against his consent.

The other alleged knowing and wilful omission, neglect or refusal on the part of Mr. O'Neill to do a thing required by law to be done by him, in the conducting of his business as a wholesale liquor dealer, arises under

the 45th section of the Act of 1868, which requires that "every rectifier, wholesale liquor dealer and compounder of liquors shall provide himself with a book"—I call your attention particularly to the language of this section,—"shall provide *himself* with a book, to be prepared and kept in such form as shall be prescribed by the commissioner of internal revenue, and shall, on the same day on which he receives any spirits, and before he shall draw off any part thereof, or add any water or anything thereto, or in any respect alter the same, enter in such book, and in .the proper columns respectively prepared for the purpose, the date when, the name of the person or firm from whom, and the place whence, the spirits were received, by whom distilled, rectified or compounded, and when and by whom inspected, and, if in the original package, the serial number of each package, the number of wine gallons and proof gallons, the kind of spirits, and the number and kind of adhesive stamps thereon; * * * and, if any rectifier, wholesale dealer or compounder of liquors shall refuse or neglect to provide such book, or to make entries therein, as aforesaid, * * * he shall pay a penalty of one hundred dollars, and, on conviction, shall be fined not less than one hundred dollars, nor more than five thousand dollars, and imprisoned not less than three months, nor more than three years." The penalty of one hundred dollars, and this fine and imprisonment on conviction, are provided for the refusal or neglect to make the entries, whether the refusal or neglect is knowing and wilful or not. It is the refusal or neglect that is to be punished, without regard to the question of intent, knowledge or wilfulness. The requirements of the 45th section in regard to rectifiers, wholesale liquor dealers and compounders of liquors, differ, in a very marked manner, from the provisions of the 19th section of the same Act, in regard to distillers, showing that Congress intended something by the difference. The 45th section

requires, that the rectifier, wholesale liquor dealer and compounder of liquors shall enter in a book the things specified in the section, and it provides, that if he shall refuse or neglect to make the entries, or shall make any false entry, he shall be subject to the penalty and punishment therein prescribed. It does not provide that any one else may make the entries, nor does it impose any penalty or punishment upon any one else for omitting to make the entries or for making false entries, or upon the rectifier, wholesale liquor dealer or compounder of liquors, if any other person omits to make the entries, or makes false entries. It requires the principal himself to make the entries, and it imposes the penalty and punishment upon him solely. It does not say that the penalty and punishment shall be imposed if there shall be a neglect to make the proper entries, or if any false entries shall be made; but it imposes the penalties upon the principal himself alone, if he fails to make the proper entries or if he makes false entries. Turning to the section in regard to distillers, the 19th, we find its provisions to be very different. It says, that the distiller "shall, from day to day, make, *or cause to be made*, true and exact entry, in a book," etc.; and then it goes on to provide that, if any false entry shall be made, or if any entry required to be made shall be omitted, a given penalty shall be paid by the distiller—a very proper provision, because he is bound, either to make the entries himself, or to cause them to be made, and he is, therefore, made responsible for the acts and omissions of other persons, in this respect. Not so with the rectifier, the wholesale dealer, and the compounder of liquors, under the 45th section. The 19th section then goes on to provide, that any person making a false entry, or omitting to make any required entry, with intent to defraud, shall, on conviction, be punished by fine and imprisonment. Therefore, in the present case, it was the duty of O'Neill to make the entries himself in his

book, and he had no right to delegate the making of them to any other person. The difference between the requirements in regard to the wholesale liquor dealer, and those in regard to the distiller, are marked and intentional. As O'Neill had no right to delegate the making of the entries in his book to any other person, the fact, if it be such, that he gave a general direction to his clerk to make proper entries, is utterly unimportant. Under this law, it was his business to make the entries himself; and the only question for your consideration is, whether, in fact, he knew that the five barrels of spirits proved to have been purchased and received by him from McNierny, were not entered in his book, and whether the non-entry of them, on his part, was an act of his will, or was against his will.

If, therefore, O'Neill knowingly and wilfully—as those terms have been explained to you—omitted or neglected to obliterate the stamps from the barrels referred to, at the time their contents were dumped, then, for that cause alone, without reference to the question of non-entry in the book, all the spirits and liquors under seizure are forfeited to the United States. And so, also, if he knowingly and wilfully omitted or neglected to enter in his book the five barrels referred to, all the spirits and liquors seized are, for that cause, forfeited to the United States.

The counsel for the claimant presented the following requests to the Court, to charge the jury, which requests were refused by the Court:

1. The simple fact that O'Neill omitted to erase the stamps on certain barrels at the time of emptying them, knowing that they were not erased, is not sufficient, under section 96, to justify a verdict of condemnation for a violation of section 43, for knowingly and wilfully violating that section, but the jury must believe that there was some wrongful intent in such omission.

2. The forfeiture imposed by section 96 of the Act, applies only to offences for which there is no specific penalty or punishment imposed by any other section of the Act; and, as all the offences complained of in this case, to wit, the offences against section 45 and section 43, are punished by a specific punishment imposed by those sections, section 96 has no application to this case, and, upon this section, the jury must find for the claimant.

3. If the jury shall believe that it was the *bona fide* intention of the claimant, at the time of emptying the barrels referred to, that none of the barrels should be refilled with spirits, by himself or any other person, without previous erasure of the stamps, and that the stamps upon none of said barrels should be removed by any person, and used upon any other barrel of spirits, then the offence against section 43, by the claimant, is not such as works a forfeiture under section 96.

The jury found a verdict for the United States as to the empty barrels and the distilled spirits and liquors, and for the claimant as to the rest of the property seized.

Thomas Simons, (*Assistant District Attorney*,) for the United States.

Thomas Harland and *Daniel G. Rollins, Jr.*, for the claimant.

DECEMBER, 1869.

IN THE MATTER OF HENRY B. MONTGOMERY, AN INVOLUNTARY BANKRUPT.

PROOF OF DEBT.—SURRENDER OF PROPERTY TO ASSIGNEE.—AMENDMENT.—INDIVIDUAL AND PARTNERSHIP ASSETS.

Where a creditor, who had received property from a bankrupt, in preference over other creditors, contrary to the 39th section of the bankruptcy Act, had surrendered it to the assignee:

Held, That, under the 23d section of the Act, he could prove his debt against the estate.

Where a creditor filed a proof of debt on May 28th, 1869, and in the following October was examined by the assignee, and then applied to amend his proof of debt:

Held, That his application should be granted.

Where a creditor had proved a claim as endorser upon a note made by the bankrupt, but it appeared that, after the adjudication of bankruptcy, a new note had been given, and the first note taken up:

Held, That the proof of debt must be disallowed.

One member of a firm bought out the other, taking the notes and books of the firm, and agreeing to pay the debts of the firm, and he continued the business for fourteen months, replenishing the stock, mingling old and new, and selling from either indifferently, so that it was impossible to tell which were the firm's goods. He was then adjudicated a bankrupt, and the stock was sold by the assignee as his goods:

Held, That the proceeds in the hands of the assignee were to be held to be the individual estate of the bankrupt, and to be subject to the payment of his individual debts, before they could be applied to the payment of the debts of the firm.

THIS was a case of involuntary bankruptcy, in which Baldwin Griffin had filed a proof of debt, which was objected to by the assignee. It appeared that the bankrupt, being indebted to Griffin in the sum of $2,168.40, executed to him a bill of sale of a stock of goods, for the nominal consideration of $9,000, out of which Griffin's claim was to be deducted, and the rest was to be paid to some twenty-three other creditors of the bankrupt. This

transaction was one of the grounds on which Montgomery was adjudicated a bankrupt. Griffin voluntarily surrendered the property which he had received under the bill of sale, to the assignee, and proved his debt. The assignee applied to have the claim disallowed, on the ground, that Griffin, at the time of the transfer to him, had reason to know that a fraud on the bankruptcy Act was intended, and, therefore, could not prove his debt, under the 39th section of the bankruptcy Act. The register certified the question to the Court, with his opinion, that, under the 23d section of the Act, Griffin might prove his claim, because he had surrendered to the assignee the property which he had received under the preference, and that the application of the assignee should be denied.

BLATCHFORD, J. The construction given by the register to the 23d and 39th sections of the Act is the correct one, and the motion of the assignee should be denied.

In the same matter, James B. Olney, another creditor, filed a proof of debt, on May 28th, 1869. On the application of the assignee, an order was made, requiring Olney to appear before the register, on October 6th, 1869, and submit to an examination, in regard to his claim. Other creditors were also ordered to be examined at the same time. Olney appeared as solicitor for some of them, and the proceedings were, from time to time, adjourned, till November 30th, 1869, when Olney was examined, and he then moved for leave to amend his proof of debt, by setting out the items which made up the amount. The motion was made on his examination, and on an affidavit excusing the error in the proof. The register certified the question to the Court, with his opinion, that, under the 22d section of the bankruptcy Act, the application to amend should be granted.

BLATCHFORD, J. The decision of the register is correct

Another creditor, Jonathan B. Cowles, on the 24th of March, 1869, filed a proof of debt, based upon a note, made by Montgomery, on the 24th of December, 1868, for $500, endorsed by Cowles, and held, at the time the proof was filed, by the Farmers' National Bank of Catskill. The assignee obtained an order for the examination of Cowles, and, upon that examination, moved that his claim be disallowed. It appeared that, on January 8th, 1869, Montgomery made his note for $500, payable to his own order, three months from date, at the Farmers' National Bank. The note was endorsed by Montgomery, then by Baldwin Griffin, and then by Cowles, and was held by the bank when Montgomery was adjudged a bankrupt, and when Cowles proved his claim thereon. It afterwards fell due, and was protested for non-payment. On the 19th of July, 1869, five months after the adjudication in bankruptcy, a new note, for $500, was given by Montgomery, to the order of Baldwin Griffin. It was endorsed by Griffin, and by Jonathan B. Cowles, and was used to take up the first note. When the second note fell due, it also was protested, and a third note, for $450, signed by Griffin, to the order of J. B. Cowles, and endorsed by him, was used, with $50 in money, advanced by J. B. Cowles, to take up the second one. This third note was still outstanding. The register certified the question to the Court, with his opinion, that, under the 6th clause of the 19th section of the bankruptcy Act, Cowles would have been entitled to prove his claim on the original note, and his right to receive dividends would depend upon his having paid any of it; but that the original debt was extinguished by the giving of the new notes, and, therefore, Cowles' proof of debt should be stricken out.

BLATCHFORD, J. The decision of the register is correct.

The register also certified to the Court a question, as to the class of creditors who were first entitled to dividends. The question arose on the following facts:

In the Matter of Henry B. Montgomery, an Involuntary Bankrupt.

Up to November 23d, 1867, the bankrupt and Sylvester B. Sage were copartners in business, under the name and style of Montgomery & Sage, at Prattsville, in Greene county, as country merchants. On the day named, Sage sold out his interest in the store to Montgomery. The agreement contained this clause: "Also, that the said Henry B. Montgomery take the notes and books of the firm of Montgomery & Sage, and collect the same as far as can be, and, with the proceeds of the same, pay all the liabilities of the firm of Montgomery & Sage, which is this day dissolved, by mutual consent. But if there proves to be a deficiency, or not enough to pay the debts, the remainder is to be paid equally by both parties, and, in case there proves to be an overplus, or more than enough to pay the liabilities, then the balance is to be equally divided between both parties." On the 5th of January, 1869, Sage was adjudicated a bankrupt, on his own petition, and, about one month afterwards, Montgomery was adjudicated a bankrupt, upon the petition of certain of his creditors. Montgomery had continued the mercantile business as successor to Montgomery & Sage, and had, from time to time, replenished the stock of goods, mingling old and new together, and selling from either indifferently, so that it was impossible to tell which were the goods of Montgomery & Sage, and which were the goods of Montgomery alone. Moreover, the entire stock had been sold by the assignee of Montgomery as Montgomery's goods. The register gave his opinion, that the assets in the hands of the assignee should be regarded as belonging to Montgomery's individual estate, and liable, in the first instance, to the payment of Montgomery's individual debts in full, before any portion could be applied to the payments of the debts of Montgomery & Sage.

BLATCHFORD, J. I concur with the register in his conclusion.

Eastern District of New York,

DECEMBER, 1869.

THE STEAM PROPELLER LEO.

COLLISION IN A SLIP.—PROPELLER'S SCREW.—NOTICE.—COSTS.

A canal-boat was moored at a bulkhead, by lines sufficient to enable her to withstand all the ordinary forces of wind and tide. A large propeller, with a screw 11 feet 9 inches in diameter, was lying at the pier, with her stern towards the canal-boat, and 40 to 75 feet distant. A short time before the sailing of the propeller, her engine was put in motion, making about 30 revolutions a minute. This was done without any notice to the canal-boat, and the current made by her screw parted the canal-boat's fasts, whirled her round in the slip three times, and drove her against the bulkhead with such force as to sink her:

Held, That the propeller had no right to set in motion such a current of water, in a crowded slip, without, in some way, notifying vessels likely to be affected by it, so as to give them opportunity to protect themselves from it, by getting out extra fasts, and that the propeller was liable for the damages.

The question being a new one, no costs were awarded against the propeller.

BENEDICT, J. This is an action brought to recover of the steamer Leo, the value of the canal-boat Almira, sunk in the slip at Pier 16, in the East river, on the 13th of April, 1869.

As to the facts, there is little dispute. They are as follows: The canal-boat was moored at Pier 16, and was there securely fastened to the bulkhead, by two strong lines, sufficient to enable her to withstand all the ordinary forces of wind or tide.

The Leo, an ocean propeller, having a screw 11 feet 9 inches in diameter, was lying, at the same time, at Pier 16, her stern towards the canal-boat, and from 40 to 75 feet therefrom. On the 13th of April, which was the

sailing day of the steamer, and about three-quarters of an hour before her sailing hour, the Leo, while moored as above described, started her screw, which was caused to revolve at the rate of about 30 revolutions per minute. The water was low, and this action of the screw threw a strong current of water directly towards the bulkhead, at which the canal-boat was moored, with sufficient force to part the lines holding the canal-boat, which was whirled around in the slip some three times, in spite of the efforts of the crew to check her, and then driven against the bulkhead, whereby she was so injured that she sank, and was wholly lost.

No notice, of any kind, was given from the propeller, of her intention to start her screw, but, as soon as those on board were notified that the canal-boat had broke loose, the screw was stopped—not, however, in time to prevent the accident which followed.

These facts present a novel question, as to the proper mode of using the large screws, which have, of late, to so great an extent, superseded side-wheels, as the propelling power of ocean steamers. It would appear, from the evidence in this case, that it is a usual precaution, adopted by ocean steamers in this port, just before starting for sea, to slowly work their engines for a while, in order to ascertain their exact condition, and insure their being in proper running order, when the ship proceeds to sea. With side-wheels, this action of the engines, while the vessel is fast in the slip, does not seem to have been attended with any considerable danger to other vessels in the same slip; at least, I have never known of any such cases, and feel quite confident that I should have known, if such had occurred with any considerable frequency. That no damage has arisen from this practice of the side-wheel steamers, is owing, no doubt, to the fact, that side-wheels, while they move only the surface of the water, are also near midship, and the force of the current caused by them is, therefore, much broken before it reaches the stern. But the screw is at the

stern, and it there combines, at a single point, all the power which, in side-wheels, is distributed between the two wheels. It is, moreover, under water, and, when in motion, its necessary effect is, to drive a column of water directly aft. This current of water, which acts with sufficient power to propel the large vessel at high speed, against the heavy head-seas of the ocean, of course, when the steamer is fast to the wharf, is driven aft the vessel with very great force, and, almost necessarily, involves danger to surrounding vessels, as the facts of this case, as well as those in the case of *The Washington*, (2 *M. L. Cases, p.* 23,) clearly show. And a question might, perhaps, arise, as to the legal right of any vessel to set in motion, in the crowded slips of this port, a force so powerful. Such action is expressly forbidden in the river Thames. (See *Thames Conservatory By-Laws*, 1860.) But, upon the evidence in this case, the question is narrowed to determining whether such a force can be set at work, without giving previous notice to surrounding vessels, so as to enable them to protect themselves against it. To such a case, the maxim, *sic utere tuo, ut alienum non lædas* applies, and it must be held that, if the propellers have any right at all to turn their screws, when the vessel is fast in the slip, it is certainly accompanied with the duty of, in some way, notifying vessels likely to be affected, so as to give them the opportunity, by getting out extra lines, or otherwise, to protect themselves against the current, which must flow from the motion of the screw.

In the present case, it is not pretended, that any previous notice of intention to set the screw in motion was given by the steamer, and she must, accordingly, be held liable for the damage which ensued.

On account of the novelty of the question raised, I award no costs against the steamer.

For libellant, *O. Frisbie.*

For claimant, *J. K. Murray.*

DECEMBER, 1869.

THE STEAM TUG E. W. GORGUS.

COLLISION AT ATLANTIC DOCKS.—NARROW PASSAGE.—SIGNAL.

The steam tug E. W. Gorgus was intending to come out of the Atlantic Docks, the entrance to which is by a narrow gap between piers, on which are built warehouses which obstruct the view, except opposite the entrance. She blew her whistle, as a signal of her intention to go out, and, hearing no answering signal, entered the gap. She then discovered the steam tug W. S. Earle, coming into the dock, and at once stopped, but the two vessels came together:

Held, That, whether the failure of the Gorgus to hear any signal from the Earle arose from the fact that the latter gave no signal, or from the coincidence of the Earle's whistle with that of the Gorgus, in either case, there was no negligence on her part, and as no subsequent negligence was shown, the libel against her must be dismissed.

BENEDICT, J. The collision, which is the foundation of this action, occurred on the 20th of November last, in the day time, at the mouth of the entrance to the Atlantic Docks, between two steamboats, one of which, the William S. Earle, was intending to enter the docks, and the other, the E. W. Gorgus, was passing out of them.

It is clear, upon the evidence, that the Gorgus gave the usual signal, indicating her intention to pass out through the gap, and it seems, also, clear that she heard no signal from the Earle, until it was too late for her to avoid the Earle, by stopping. Whether her failure to hear any signals from the Earle arose from the absence of such a signal, or from the coincidence that the signal from the Earle was blown at the same instant with the whistle of the Gorgus, and, therefore, not heard, would not affect the question of negligence, on the part of the Gorgus.

As soon as the Gorgus passed the corner of the buildings, which surround the dock, and hide the gap from

approaching vessels, the Earle was seen, and the Gorgus stopped, and I see nothing, in her subsequent conduct, which indicates negligence.

The proofs, therefore, failing to fasten any negligence upon the Gorgus, which conduced to the collision, the libel must be dismissed, with costs.

For libellant, *F. A. Wilcox.*

For claimant, *Beebe, Donohue & Cooke.*

DECEMBER, 1869.

SAMUEL VAN WINKLE *v.* T. W. JARVIS *et al.*

OPENING DEFAULT.—ATTACHMENT.

Process being issued, with an attachment clause, the marshal attached property of the respondents, but afterwards discharged it from custody, without any order of Court, and served the process upon them personally. On the return of the process, a default was taken against them, which they moved to open. The libellant insisted that, as a condition of opening the default, they should be required to give security, as on a discharge of property attached:

Held, That, under the circumstances of the case, the condition was a reasonable one, and that the default would be opened, without costs, on the respondents executing such a stipulation.

BENEDICT, J. This is a motion to open a default, taken against the defendants, for failure to appear and answer, on return of the process.

The default appears to be regular, and the libellant now asks that, if it is to be opened, and the defendants are to be allowed to come in and defend, it be upon the condition that they give security, as upon a release of an attachment of property seized under the attachment

clause of the process. This condition is demanded, upon the ground that, by the action of the defendants, the libellants have been improperly deprived of the right to require such security.

It appears that, upon the filing of the libel, the process was issued, with the usual attachment clause, and that, in point of fact, the marshal, before serving the defendants, did, by virtue of the process, attach certain property belonging to them, which property, it also appears, was thereafter, without the order of the Court, released from custody by the marshal, and the defendants then personally served. It also appears, from the papers before me, that the defendants are residents of Brooklyn, and so appear in the Directory, but it is no where stated that they were within reach of the process, or possible to be found, up to the time of the attachment of their property. Nor is any explanation of the release of the property attempted. For aught that appears, the defendants might have intentionally kept beyond the reach of the process, until after their property was seized, and then obtained its discharge by some importunity.

The marshal having, in point of fact, and, as it must be presumed, in good faith, attached the property of the defendants, as being defendants impossible to find, could not properly, without the order of the Court, release the property. He had the right, and was, indeed, bound, to take all necessary time and pains to satisfy himself as to his ability to find the defendants, before attaching their property, but, having once made an attachment, it properly belonged to the Court to say whether the attachment was justified, or not. No explanation whatever being given by the defendants, in regard to the release of the property, and the defendants showing themselves able to give security, without inconvenience, I am of the opinion that, under the circumstances of the case, the libellants may properly ask, as a condition of opening a

regular default, to be put in the same position which they would have been, had the property not been released.

Let the default be opened, without costs, upon the defendants filing the usual stipulation given upon the discharge of property attached in actions *in personam*.

For libellant, *Beebe, Donohue & Cooke.*

For respondent, *Mitchell & Seymour.*

DECEMBER, 1869.

THE STEAMER CITY OF NORWICH.

COMMON CARRIER.—LOSS BY COLLISION.—FIRE.—BILL OF LADING.

A steamer and a schooner collided on Long Island Sound, in the night. The steamer was bound from New York to New Haven, and the schooner was close-hauled, on a course nearly at right angles with the steamer's course, and kept that course unchanged. The steamer also kept her course unchanged, until close upon the schooner, which she did not see, as she claimed, until it was too late to avoid her. The schooner struck the steamer on her starboard side, making a large hole in her, into which the water rushed. When it reached the lower furnaces, flames burst out, and soon enveloped the boat. As the fire burnt off her upper works, and as she filled, she slowly sank, rolling over as she filled. Libels were filed against her, by several owners of the cargo on board. Some of the cargo was shipped on simple receipts, and some on bills of lading-containing the following clause: "Dangers of the seas, fire, water, breakage, leakage, and all other accidents excepted—the risk of all which, it is stipulated, shall be borne by the owner."

Held, That, if the schooner was not seen, as claimed by the steamer, until it was too late to allow of any change of her course, there was negligence on the part of those in charge of the steamer, in not seeing her sooner;

That the restriction in the bills of lading could not relieve the vessel from loss occasioned by such negligence;

That the fire must be considered as an incident of the collision;

That, if it were true, as claimed, that, but for the fire, the vessel would not have sunk, and could have been towed in, such a consideration would not have the effect to screen the carrier, whatever might have been its weight in a question between insurers and insured; moreover, it was not proved that these particular goods were burned, or sunk in the boat;

That there was no defence, under the Act of March 3, 1851;

That the vessel was liable, therefore, to all the libellants.

BENEDICT, J. These actions (fourteen in all) were separate proceedings *in rem*, instituted against the steamboat City of Norwich, by various shippers of cargo, to recover the value of certain goods, which were received on board the steamer, for transportation to New York, but were never delivered. After the seizure of the vessel, under processes issued upon several of the libels, it being made to appear that the claims likely to be brought against her, arising out of the same disaster, would exceed her value, she was bonded in her full value, the stipulation to be for the benefit of all parties who might come into this Court and file libels against her, for damages caused by the same disaster.* After the discharge of the vessel under such a stipulation, one or two other libellants commenced proceedings in this Court, and were, on motion, declared to be entitled to the benefit of the stipulation given for the vessel, and all the cases have been heard together upon their respective pleadings and proofs, and are now to be disposed of.

The various actions may be divided into two classes —one, where the goods sued for were shipped under a bare receipt, without any limitation of liability on the part of the carrier; the other, where there was a bill of lading containing the following clause: "Dangers of the seas, fire, water, breakage, leakage, and all other accidents excepted—the risk of all which it is stipulated shall be borne by the owner." In other respects all the cases are alike.

* For this stipulation, and the decision under which it was given, see 1 *Ben.*, *p.* 89.

The proofs showed the loss of the goods to have occurred as follows :—

The steamer, while proceeding from New Haven to New York in the night, and when in the Sound, some seven or eight miles north easterly of Eaton's Neck, came in collision with the schooner General Van Vliet, which was sailing close hauled, on a course nearly at right angles with that of the steamer. The steamer was seen from the schooner at some distance, and the course of the schooner was held unchanged. The steamer also held her course unchanged, until close upon the schooner, when it was too late to alter her course or materially check her speed, and the vessels came in violent contact, at nearly right angles with each other. The steamer received the blow on her larboard side, about sixty feet abaft the stem, where her hull was stove by the schooner's bow, a large hole being made, through which the water at once poured in large volume. In a very few moments after the blow, the water in the steamer reached the lower furnaces, and at once flames burst out, which shortly enveloped the boat. As the fire burned off her upper works, and as she filled, the steamer sank slowly, rolling over as she filled, and finally resting at the bottom, upside down. Much evidence was introduced on both sides tending to show the cause of the collision, which I have carefully considered, and as to which I deem it sufficient to say, that, if it be true, as claimed by the steamer, that the schooner was not seen from the steamer, until the vessels were too close together to admit of any change of course on the part of the steamer, there was, in my opinion, negligence, on the part of those in charge of the steamer, in not seeing the schooner as soon as they might have done, and in time to have avoided her.

The collision which is claimed to have caused the loss of the goods being thus found to have arisen from the negligence of the carrier, it follows that the libellants

are entitled to recover, as well those having bills of lading as those having simple receipts, for it must be considered to have been settled that, while a carrier may restrict his liability by contract, such restrictions as appear in these bills of lading do not relieve from losses caused by the negligent navigation of his master and crew. (1 *Par. M. L., p.* 171–191.)

But it is said that the goods in question were lost by the fire, and not by the collision, and that the fire was accidental, and not the result of negligence. My opinion, however, is, that the fire must be considered to have been simply an incident of the collision, a natural result, almost sure to follow such a blow inflicted in certain places upon such a vessel as this steamer—a result which, in this instance, did follow the blow almost immediately and directly—and, as between the shippers and the ship, in law, a result of the negligence which brought the steamer in contact with the schooner.

Indeed, the answer in the fourth article describes the fire as caused by the collision, and supposes it to be properly chargeable to the bad navigation of those on board the schooner.

I have not overlooked the argument which has been drawn from a line of proof, tending to show, from the specific gravity of the steamer, that, in the absence of the fire, the vessel would not have sunk below her promenade deck, and could then have been towed ashore, and her cargo saved; and, were this an action upon a policy of insurance against fire, it might be held, upon such proof, that, as between the insurers and insured, the sinking of the vessel was caused by fire; for fire, which was insured against, was one cause of the loss. But here the actions are against the carrier, who undertook to carry with care, and is shown guilty of a negligence which set in motion a train of circumstances, not necessarily indeed, but naturally, leading to the loss which occurred. The distinction between such actions and

actions upon policies of insurance will be found stated in *Gill* v. *The General Iron Screw Collier Co.* (1 *Com. Pleas*, 600.)

And besides, the burden of proof being upon the carrier, it is not here shown that the particular goods sued for were burned by the fire or sunk in the boat. The evidence shows that some of the cargo was burned, and some sunk in the boat, and that some floated off, and was either picked up or lost in the water. But there is no evidence disclosing what became of these particular goods. All that is shown in regard to them is, that they were received by the carrier and never delivered, and that all the cargo was involved in the disaster of the 17th of April.

The proofs, therefore, fail to make out a foundation for the argument derived from the effect of the fire upon the specific gravity of the steamer and cargo.

These views dispose of the argument, which was based upon the Act of March 3d, 1851. Assuming that this steamer was not excluded from the effect of the Act by the seventh section—a question which has not been raised upon this argument—and assuming, also, that the Act, although confined, in terms, to the owners, can be construed as applying also to the vessel—neither of which questions I here decide—it appears to be clear, that the first section of the Act can have no application in a case where fire is but an incident of a collision. Losses by collision are provided for in a subsequent section, where, by the terms of the statute, the owners are made liable for such losses, to the extent of their interest in the vessel.

My conclusion, accordingly, is, that these respective libellants are entitled to recover, of this steamer, the amount of the damages by them sustained by reason of the non-delivery of their goods. A decree will be, accordingly, entered, with orders of reference to ascertain and report the amount of such damages.

DECEMBER, 1869.

THE STEAMBOAT ALIDA.

COLLISION IN NEW YORK HARBOR.—TOW-BOAT.—VESSEL AT ANCHOR.—SUDDEN GALE.

A tow-boat, with thirty canal-boats, four barges, and a sloop in tow, was bound down the North river, with an ebb tide. In passing a large steamer, which lay at anchor, the hawser tier struck the steamer, and two of the canal-boats were sunk. The defence set up was, that a sudden squall of wind struck the steamer, as the tow was passing at a proper distance, and drove her into the tow:

Held, That the defence had not been made out, but that the collision was occasioned by lack of precaution on the part of the pilot of the tow-boat.

BENEDICT, J. These two actions, which have been tried together, were brought to recover the amount of the injury caused to the cargoes of two canal-boats, the Emma Davis, and the William Burr, by a collision, which occurred in the North river, on the 16th of September, 1869, between the steamship Borussia, and the steamboat Alida and her tow, of which the canal-boats named formed a part.

It is not contended by either party, that the collision was caused by any fault on the part of the canal-boats. The sole question is, whether it was caused by negligence on the part of the Alida, which was, at the time, towing the boats.

The tow of the Alida consisted of two barges on each side, and a hawser tow of thirty canal-boats, arranged in six tiers of five boats each—astern of which, were a sloop and two barges, on a stern hawser some 220 fathoms long. The tow was bound down the North river, upon an ebb tide, and the Borussia, a large sea-going propeller, was lying at anchor, near the middle of the river, off the dock of the Hamburgh steamers.

As the Alida and her tow came down to the Borussia, she determined to pass to the eastward of the steamer—that is, between the steamer and the New York shore—and she did, herself, so pass in safety; but, in passing, her hawser tow came in contact with the bows of the steamer, and the canal-boats Emma Davis and William Burr brought up heavily upon the Borussia, and her chain, and were so injured that their cargoes were totally destroyed.

The defence of the Alida, as now made, is, that the collision was occasioned by an event purely fortuitous, namely, a sudden squall of wind, which struck the Borussia, as the Alida was passing at a proper distance, and drove her to the eastward and into the tow.

In support of, and in opposition to, this defence, a mass of testimony has been taken, which is noticeable for its bold and inexplicable contradictions. It has all received my best attention, aided by the careful briefs of the respective advocates, and it has failed to satisfy my mind that the disaster was caused as claimed by the defence. On the contrary, I can entertain no doubt, after weighing the evidence with care, that, if that precaution had been exercised by the pilot of the Alida, which the circumstances required, and which the law imposed upon him, he would have avoided the vessel at anchor, and the collision would not have occurred. I must, accordingly, hold, that, the collision was occasioned by the fault of the Alida, in not avoiding the Borussia, as she was bound to do.

I content myself with this announcement of the result of my examination and comparison of the testimony, not deeming it necessary to spread out, in a lengthy opinion, the various portions of this mass of evidence, which have led me to the conclusion arrived at, as all of it, I am glad to believe, will be placed before the appellate Court, and my error, if I have fallen into one, then corrected.

The decrees will, therefore, be in favor of the libellants, with orders of reference to ascertain the amount of damage.

For libellants, *T. E. Stillman.*

For claimants, *C. Van Santvoord.*

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APPEARANCE.

The general appearance of a party to a suit is *personam* waives all irregularities in the service of process, and confers jurisdiction so far as the person is concerned.

Such jurisdiction, when once conferred, cannot be withdrawn by the act of the party who has so appeared, without the consent of the Court, or of the prosecuting party.

On a petition by an assignee in bankruptcy, seeking to set aside transfers of property by the bankrupts to K., the Court made an order requiring K. to show cause why the prayer of the petition should not be granted, which order was personally served on K., in Illinois. Thereupon a general appearance for K., by an attorney, was filed with the Clerk of the Court, and served on the attorney for the petitioner, and proceedings on the order to show cause stood over for the party to answer. On the adjourned day, the attorney for K. filed a withdrawal of his appearance for K., stating that the same had "been made by mistake":

Held, That the attorney had no right to withdraw such appearance without application to the Court for leave to withdraw it, and that the Court had jurisdiction over K. to grant the relief prayed for against him. *Ulrich's Case*, 365

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BANKRUPTCY.

1. Where, after a bankrupt had filed his petition in bankruptcy, he was arrested under an order of a State Court, and, while under arrest, obtained from the bankruptcy Court an order staying proceedings in the action in which he was arrested, and the creditors, not having proved their debt in the bankruptcy proceedings, moved to set aside the stay:

   Held, That their debt, being for merchandise sold at an agreed price, was provable under the 19th section of the bankruptcy act, and was made by the 33d section none the less so, because it might, under that section, be a debt which could not be discharged;

   That no consequences can be allowed, under the 21st section, to flow from proving a debt, which are inconsistent with the provisions of the 33d section. Therefore, so much of the 21st section as imposes a penalty for proving a debt, cannot be construed as applying to a debt which, by the 33d section, is not dischargeable. *Myron Rosenberg's Case*, 14

2. Where a bankrupt, for a year before filing his petition, was engaged in the business of buying and selling furniture on his own account, having a shop where his goods were displayed and sold:

   Held, That he was a merchant or tradesman, under the 29th section of the Bankruptcy Act. *Newman's Case*, 20

3. Where a bankrupt kept no books but two memorandum books, from which he could not tell the amount of the business he had done, or the particulars and consideration of debts due to and by his principal debtors and creditors:

   Held, That the bankrupt had not kept proper books of account under the 29th section, and a discharge must be refused. *Id.*

4. The question, what are proper books of account to be kept by a merchant or tradesman, is in each case a question of evidence. *Id.*

5. Where a bankrupt, who had formerly been a member of a firm engaged in the insurance brokerage business, which was transacted without capital, was taken into the employment of that firm, and continued for some time in that employ, taking a prominent part in the transaction of the business, and then, he being dissatisfied with one of the partners, an agreement was made whereby the bankrupt's wife paid to such partner $4,000, which he had paid for two-tenths of the business, and was herself made a partner in his place, receiving two-tenths of the profits, but not rendering any services, the object of that arrangement being to retain the services of the bankrupt to the firm:

   Held, That, under the circumstances of the case, the arrangement was fraudulent, and the bankrupt was the true owner of the interest in question, which he had fraudulently concealed; and that, therefore, a discharge must be refused to him. *Rathbone's Case*, 50

6. Where a bankrupt, who had failed on Feb. 25th, 1868, on that day made an assignment of all his property for the benefit of all his creditors without preference, and on Feb. 29th, filed his petition in bankruptcy:

   Held, That even if the bankrupt could be allowed to show, that he had no intention, at the time of making his assignment, of filing a petition in bankruptcy, yet he had failed to

show it. His denial of such intention, in the absence of any confirmatory circumstances, is not sufficient to repel the presumption which arises from the fact.

That, therefore, his discharge must be refused. *Brodhead's Case*, 106

7. Where a firm was carrying on business in different places in Ohio and Tennessee, and their paper went to protest about April 1st, 1867, and about the same time some of their establishments were seized by the Government of the United States for alleged violations of the Internal Revenue law, and within a short time thereafter they transferred to seven different creditors four stocks of goods and their real estate, towards payment of the debts due by them to such creditors:

Held, That, on the facts, the bankrupts were insolvent when such transfers were made;

That such transfers of goods were giving fraudulent preferences, contrary to the provisions of the 39th section of the Bankruptcy Act, and that discharges must be refused to the bankrupts. *Louis & Rosenham's Case*, 153

8. Where creditors opposed the discharge of a bankrupt on the ground that he had made a voluntary assignment of his property for the benefit of his creditors, contrary to the provisions of the Bankruptcy Act, and it appeared that, after the assignee had taken possession of the property under the assignment, an instrument in writing was executed by certain of the creditors, among whom were the opposing creditors, consenting that the assignee might transfer the assigned property to one R., and requesting said R. to "accept such transfer, take possession of said estate, dispose of the same, and distribute the nett avails thereof among all the creditors, according to the terms of said assignment," and thereupon the property was transferred to R. by the assignee:

Held, That, on this state of facts, the opposing creditors were estopped from setting up the assignment in opposition to the discharge, and that a discharge would be granted when a certificate of conformity was furnished by the Register. *Schuyler's Case*, 200

9. The second clause of the 33d section of the Bankruptcy Act provided, that, "in all proceedings in bankruptcy commenced after one year from the time this Act shall go into operation, no discharge shall be granted to a debtor whose assets do not pay fifty *per centum* of the claims against his estate, unless the assent in writing of a majority in number and value of his creditors who have proved their claims is filed in the case at or before the time of application for discharge." The year expired on June 1st, 1868. On July 27th, 1868, an Act was passed declaring that the second clause of the 33d section above mentioned "shall not apply to the cases of proceedings in bankruptcy commenced prior to the first day of January, 1869," &c., (15 *Stat. at Large*, 227):

Held, That the provisions of this latter Act extended to proceedings in bankruptcy commenced between June 1st, 1868, and July 27th, 1868, as well as to proceedings commenced on and after July 27th, 1868. *Billing's Case*, 212

10. Where the marshal had taken possession, under an order of the bankruptcy Court, of the property of a bankrupt, including a steamship, and, after the assignee in bankruptcy was appointed, delivered over the keys of the vessel to the assignee, and remained in charge of her on behalf of the assignee, and thereafter a libel was filed against the vessel, to recover damages for a collision which occurred before the adjudication in bankruptcy, on which libel process was issued to the marshal:

Held, That the libellants must be enjoined from attempting to hold the vessel, or interfering with her in the hands of the assignee.

That, if the libellants had a prior lien on the vessel, it must be enforced by being submitted to the arbitrament of the bankruptcy Court. *The People's Mail Steamship Co.'s Case*, 226

11. Where bankrupts appeared to have lost, in twenty-one months, a capital of

$120,000, and were left with debts to the amount of $200,000, and it appeared that they had trusted their business almost exclusively to an uncle, in whom they had confidence, and who was able to make them believe that they were making large profits in buying and selling ships, and who, by this means, cheated them, leaving them with a claim against him of $640,000, on which nothing could be realized:

Held, That, on all the facts, it sufficiently appeared that the bankrupts had not been in any complicity with their uncle, in defrauding their creditors, but had been themselves defrauded, and that discharges would be granted to them. *Beatty's Case*, 233

12. A baker, who buys flour, which he makes into bread, and sells the bread to daily customers, is a tradesman within the meaning of the 29th section of the Bankruptcy Act, and is not entitled to a discharge, if he has not kept proper books of account. *Cocks' Case*, 260

13. If a debtor, at any time, from the state of his circumstances, contemplates that he will not be thenceforth able to pay his debts as they mature, in the ordinary course of business, he contemplates insolvency.
H. E. Dibblee & Co.'s Case, 283
Graham v. *Stark*, 520

14. The ordinary course of business does not mean an ability to turn out goods or other property to pay one debt, without leaving in the debtor's hands assets to provide for other debts as they become due. *H. E. Dibblee & Co.'s Case*, 283

15. If a debtor, knowing that a debt is past due, and being insolvent or contemplating insolvency, refrains from going into voluntary bankruptcy, and his property is taken on legal process, the debtor suffers his property to be taken on legal process. *Id.*

16. Neither the question whether the property, the transfer of which is alleged to have been an act of bankruptcy, shall be retained by the creditor to whom it was transferred, nor the question whether the bankrupt shall receive his discharge, will be affected by the verdict of the jury on the question, whether an act of bankruptcy has been committed. *Id.*

17. One member of a firm, composed of three persons, which was indebted to I. &. Co., gave them a confession of judgment on February 25th, 1869. I. & Co. kept the confession till April 30th, 1869, when they filed it, entered judgment for $54,105, and issued execution to the sheriff, who, on the same day, went to the store of the debtors and levied on their goods, and remained in possession till about 10 P. M. of the next day, when a transfer of $46,000 of accounts, bills receivable, and other securities, was made to I. & Co., in payment of the debt. On the morning of April 30th, before the sheriff came, one of the firm paid $2,000 to K., upon a fiduciary debt of $4,000, and the next day, while the sheriff was in possession, he gave K. $2,000 worth of securities to pay the rest of such debt.

Held, That the giving of the c nfession of judgment did not, of itself, raise a presumption that the firm was insolvent when it was given;

That if, at the time the sheriff appeared with the execution, the firm were unable to pay their debt to I. & Co., in the ordinary course of business, they were insolvent within the meaning of the bankruptcy Act;

That if the taking of the property of the firm by the sheriff had the necessary effect to give to I. & Co. a preference, which they would not have had otherwise, and if the firm, being insolvent or contemplating insolvency, suffered its property to be taken on that execution, they intended, in law, to give the preference which the taking of the property conferred;

That if the transfer of the 1st of May put I. & Co. in a better position, as to their debt, than they occupied by reason of their levy, that gave them a preference which the law forbids;

That the fact that the confession of judgment was signed by only one member of the firm, did not impair the effect of the judgment in determining the question of bankruptcy;

That the fact that the debt to K. was a fiduciary debt, was not of con-

sequence, nor was the fact that K. pressed for payment of it. *Id.*

18. C., a member of a firm, transferred to S., his partner, by a written instrument, all his interest in the firm property, to be applied to the payment of the partnership debts, the assignment stating that the firm was dissolved, "except so far as it may be necessary to continue the same for the final liquidation and settlement of the business thereof." S. thereafter made an assignment of all the firm property, in trust to pay creditors, with preferences, which assignment was afterwards, in a suit brought by creditors in the Superior Court of the city of New York, set aside, as fraudulent and void, as against such creditors, and the assignee was directed to pay the creditors' claims out of the proceeds of the assigned property in his hands, and did so, and also paid other preferred debts, leaving but a small balance in his hands. Thereafter, on the application of another creditor, S. was declared a bankrupt, in a proceeding against him alone, and the assignee in bankruptcy filed a petition against the assignee of S., praying to have that assignment set aside as void, under the 35th and 39th sections of the bankruptcy Act, and to have the property which came to his hands under it, delivered up to the assignee in bankruptcy:

Held, That the transfer from C. to S. did not dissolve the firm, and the property remained partnership property till the partnership debts were paid;

That there must be an adjudication of bankruptcy against the partners composing the firm, before any step could be taken in bankruptcy to reach the partnership assets;

That the petitioner, being the assignee of S. alone, could not call upon any one to account for such partnership property, and that his petition must be dismissed. *Shepard's Case*, 347

19. A note and a due bill given for money loaned to a manufacturing company, payable on demand, are not "commercial paper" within the meaning of the 39th section of the Bankruptcy Act.

The object to which the money borrowed was applied, cannot affect the character of the instrument given as evidence of the indebtedness. *The McDermott Patent Bolt Manufacturing Co.'s Case*, 369

20. The "debt provable under the Act," which a creditor must have as a foundation for a petition in involuntary bankruptcy, may be an equitable demand.

If the nature of the debt is set forth in the petition, which avers that the debt is provable under the Act, the question whether it is so provable is to be determined as a question of law and not of fact. *Sigsby v. Willis*, 371

21. A member of a firm, which has been dissolved, is not entitled to an adjudication of bankruptcy against his copartner on the ground that he can prove a debt against him in respect to bonds and mortgages given by them jointly, under the 19th section of the Bankruptcy Act;

Nor can he have such an adjudication on the ground of his having a contingent debt against his copartner;

But, if one partner fraudulently misappropriates the partnership funds, the other partner may treat the misappropriation as foreign to the copartnership, and prove the claim as a debt, precisely as though no partnership had existed. *Id.*

22. A debtor made an assignment of all his property for the benefit of all his creditors, without preference. More than ten months afterwards he filed his petition in bankruptcy, and his discharge was opposed on the ground that he had made that assignment "in contemplation of bankruptcy," "for the purpose of preventing his property from being distributed under the bankruptcy Act." On being examined, he testified that he made the assignment in good faith, and not in contemplation of becoming a bankrupt; that he was at the time unable to pay his debts, and had suits against him; that he was advised by counsel that he had a right to make such an assignment; and that he had to make it in order to save the property for the creditors generally:

Held, That the effect of the assignment being to hinder and delay his creditors, its execution was an act of bankruptcy, within the 39th section of the Act; that the debtor executed it, therefore, in contemplation of becoming bankrupt, within the 29th section of the Act; and that his evidence that he had no contemplation of becoming bankrupt, was of no weight;

That, on the evidence, he made the assignment for the purpose of preventing the property from being distributed under the bankruptcy Act; and that, therefore, under the 29th section of the Act, a discharge must be refused. *Goldschmidt's Case*, 379

23. A debtor was arrested on August 24th, 1869, under an order of arrest issued out of the Superior Court of the City of New York, in an action founded on a promissory note for more than $100. He immediately gave bail and was not lodged in jail. The order of arrest remained in force at the time of the filing of a petition in involuntary bankruptcy against him, on September 20th, 1869:

Held, That, as the debtor was not actually imprisoned more than seven days on the order of arrest, he was not liable to be adjudged a bankrupt, under the 39th section of the bankruptcy Act, by reason of what occurred under the order of arrest. *Davis' Case*, 482

24. Proof, that a merchant has suspended payment of commercial paper and has not resumed payment of it within a period of fourteen days, is not sufficient to authorize an adjudication of bankruptcy against him under the 39th section of the Bankruptcy Act. The creditor must show that the stoppage or suspension was fraudulent. *Id.*

25. A trust deed of lands in Florida, made by a bankrupt, who remained in possession of the lands till the filing of his petition in bankruptcy, will not be set aside by the bankruptcy Court on petition of the assignee, unless such petition states that the lands were conveyed by the bankrupt in fraud of his creditors under the laws of Florida, or facts showing that they were so conveyed, and, therefore, passed to the assignee under the 14th section of the bankruptcy Act. *Broome's Case*, 488

26. M. & C. had filed two proofs of debt against bankrupts, one for $5.95, and a second for $86.61. They presented a petition to the Court, praying for the rejection of proofs of debt filed by another creditor, P., to the amount of $48,663. Thereupon P. presented a petition, stating that he was the owner of the debt for $86.61, and had proved it himself as a debt, and that the claim for $5.95 had no valid existence, and praying that the claims of M. & C. might be rejected. On this petition, a reference was had before the register, who reported that M. & C. were creditors in the sum of $86.61, and that the claim for $5.95 ought to be disallowed. It appeared that M. & C. had made an agreement with one L., appointing him their agent to collect their debt from the bankrupts at his expense, he to pay them one-fourth of what he should collect. This agreement was claimed by P. to be champertous. It further appeared that M. & C., having a note of the bankrupts for $173.63, had sold it to P. for less than its face; that P., in making such purchase, acted for the bankrupts; that the money with which he bought it was not his own, but proceeds of assets which belonged to the bankrupts when their petition was filed; and that the claim which M. & C. had proved was for the remainder of the note, beyond the sum they had received from P.:

Held, That the agreement between L. and M. & C. furnished no ground for disallowing the claim of M. & C.;

That M. & C., in dealing with P., supposed they were compromising the note with the bankrupts, and that they could not prove any part of it, or question the right of P. to prove it, and their proofs of debt must be disallowed;

That as, under the 22d section of the bankruptcy Act, the examination as to any proof of debt might be made without any application therefor, and as it appeared from the evidence that certain claims held by P. were not his, because he was acting for the bank-

rupts in purchasing them, they must be rejected;

That it must be referred to the register to report which claims ought to be rejected on this ground. *Lathrop, Cady & Burtis' Case,* 490

27. Securities given for the purpose of giving a preference, are none the less void under the bankruptcy Act because they were given in pursuance of a previous promise, made when the debt was contracted, to give security for it. *Graham* v. *Stark,* 520

28. Where a married woman, engaged in business, gave the management of her affairs to her husband, and was afterwards adjudged bankrupt:

Held That his acts, knowledge and intentions in reference to the business must be held to be her acts, knowledge and intentions. *Id.*

29. Where a mortgage was given by such bankrupt to secure a debt, but without the creditor's urging its execution or asking for security, but the mortgage covered the whole of the bankrupt's personal property, and was not given in the ordinary course of business, and other mortgages to another creditor were executed at the same time:

Held, That this mortgage was fraudulent and void under the bankruptcy Act;

That the other mortgages, which were on the stock and real estate, and were taken at a time and in a form which must necessarily break up the bankrupt's business, to secure a debt which had been overdue for a year and a half, were also fraudulent and void. *Id.*

30. One member of a firm bought out the other, taking the notes and books of the firm, and agreeing to pay the debts of the firm, and he continued the business for fourteen months, replenishing the stock, mingling old and new, and selling from either indifferently, so that it was impossible to tell which were the firm's goods. He was then adjudicated a bankrupt, and the stock was sold by the assignee as his goods:

He d, That the proceeds in the hands of the assignee were to be held to be the individual estate of the bankrupt, and to be subject to the payment of his individual debts before they could be applied to the payment of the debts of the firm. *Montgomery's Case,* 565

31. Where a creditor had proved a claim as endorser upon a note made by the bankrupt, but it appeared that, after the adjudication of bankruptcy, a new note had been given, and the first note taken up:

Held, That the proof of debt must be disallowed. *Id.*

See ASSIGNMENT, 2.
HUSBAND AND WIFE.
JURISDICTION, 1.
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PRACTICE (BANKRUPTCY).

BILL OF LADING.

1. Whoever receives cargo from a vessel under a bill of lading, in the absence of circumstances showing a different understanding, is liable for the freight. *The Philadelphia and Reading Railroad Co. v. Barnard,* 89

2. It is not necessary that a bill of lading should be actually indorsed, or even delivered, to a buyer, to make him an assignee of it. *Id.*

3. Where a cargo of coal, before its delivery from the vessel, had been sold by the shippers to one Merritt, who sold it to one Blanchard, and he so'd it to one Bass, who received part of it, and paid to the owners of the vessel freight on what he received, and refused to receive any more, and Blanchard then sold the rest to the respondents, who received no bill of lading, but received the coal from the vessel, and gave a receipt for it upon the captain's bill of lading, and gave Blanchard two notes, one for the price for the coal, and one for the freight, which Blanchard agreed to see paid, but which he failed to pay, and died insolvent:

Held, That the respondents were liable to the owners of the vessel for the freight on the coal which they received. *Id.*

4. Where a vessel was chartered, in Buenos Ayres, to bring a cargo of hides to New York, the charter con-

taining this clause: "The charterer furnishing the lining hides and bones for dunnage only;" and, after the vessel was loaded, ordinary bills of lading were made out, consigning the cargo to the libellant; and, on delivery of cargo, part of it was found to be damaged:

Held, That, on the facts, the injury was caused by blowing, and that the dunnage was insufficient;

That, where it appears that damage has been caused by an ordinary occurrence on a sea voyage, the burden of proof is on the ship, to show that proper precautions were taken to guard against the danger;

That the clause above set forth had no effect to relieve the ship from the duty to properly protect the cargo, and that the consignees, not being parties to the charter, but claiming under clean bills of lading, would not be bound by that clause;

That the ship was liable for the damage. *The Wilhelmina*, 110

5. The averment, in a bill of lading, that a cask was "in good order and well conditioned," extends only to its apparent external condition, excluding any implication as to its intrinsic soundness and sufficiency. *The Oliver*, 148

6. Where a cask of wine was delivered empty, the wine having leaked out through a hole, which, on the evidence, the Court found to have been a latent defect in the cask, the bill of lading containing the clause "not accountable for leakage:"

Held, That a loss by such defect afforded an excuse for the non-performance of the bill of lading, and the burden was thrown upon the consignee to show that the loss might still have been avoided by the exercise of reasonable skill, diligence, and attention on the part of the carrier;

That, as such evidence was not given, the vessel was not liable for the loss. *Id.*

7. A case of goods, being one of three specified in a bill of lading, was put over the ship's side, upon the wharf, and placed on a truck belonging to the ship, and wheeled by an employee of the ship up the wharf to the door of a little house, in which the Custom-House inspectors, who had charge of the discharging of the vessel, transacted their business, and there one of the inspectors marked it "P. S." (which indicated that it was to be taken to a public store,) and it was then wheeled farther up the wharf, but what was done with it after that did not appear, although it was in the course of business for it to be deposited in a part of the wharf designated for such goods as were to go to a public store, but it could not be found when search was made for it half an hour after. The wharf was exclusively occupied by the owners of the ship, and was enclosed on the inner end by a fence, access through which was had by gates. On a libel being filed against the ship for the non-delivery of the case according to the bill of lading:

Held, That the facts did not constitute any delivery of the case on the wharf, or to the Custom-House authorities, so as to exonerate the vessel from her liability under the bill of lading. *The Ville de Paris*, 276

8. Where a shipper of cotton in Savannah, on a vessel bound to New York, received for it a bill of lading, specifying that it was to be delivered to order, and drew a draft on B., V. P. & Co., a firm in New York, which he sold to a bank in Savannah, on the faith of the bill of lading as security for its payment, and endorsed the bill of lading to S., the cashier of a bank in New York, to which the draft was sent for collection, and the agent of the vessel in Savannah made a memorandum on the ship's copy of the bill of lading, that the cotton was to be delivered to B., V. P. & Co., and, on the arrival of the ship in New York, the bill for the freight on the cotton was sent to B., V. P. & Co., and the cotton was delivered them on their request and on their endorsement of the ship's copy of the bill of lading, without any inquiry after the other copies of it, and no notice was ever given to S. of the readiness of the ship to deliver the cotton, and, the draft not being paid, he libelled her upon the bill of lading;

Held, That the agents of the ship in Savannah were guilty of negligence

in putting such a memorandum on the bill of lading, and the agents in New York were negligent in delivering the cotton without the production of the other copies of the bill of lading;
That the libel was properly filed in the name of S.;
That, as the value of the cotton was more than the draft, the libellant was entitled to a decree against the ship for the amount of the draft and interest from its maturity. *The Thames*, 279

9. On a bill of lading, executed in Whampoâ, for the transportation of cargo to New York, the freight on which was specified to be payable in sterling money:
Held, that the shipowners were entitled to recover what it could be shown by evidence that the specified amount of British coin was worth in New York, in gold and silver coin of the United States, the recovery to be expressed in the decree to be in gold and silver coin of the United States. *Forbes* v. *Murray*, 497

10. A steamer and schooner collided at night in Long Island Sound by negligence on the part of the steamer. The schooner struck the steamer on her starboard side, making a large hole in her into which the water rushed. When it reached the lower furnaces, flames burst out, and soon enveloped the boat. As the fire burnt off her upper works, and as she filled, she sank, rolling over as she filled. Libels were filed against her, by several owners of the cargo on board. Some of the cargo was shipped on simple receipts, and some on bills of lading, containing the following clause: "Dangers of the seas, fire, water, breakage, leakage, and all other accidents excepted—the risks of all which, it is stipulated, shall be borne by the owner."
Held, That the restriction in the bills of lading could not relieve the steamer from loss occasioned by such negligence;
That the fire must be considered as an incident of the collision;
That, if it were true, as claimed, that, but for the fire, the vessel would not have sunk, and could have been towed in, such a consideration would not have the effect to screen the carrier, whatever might have been its weight in a question between insurers and insured; moreover, it was not proved that these particular goods were burned, or sunk in the boat;
That there was no defence, under the Act of March 3, 1851;
That the vessel was liable, therefore, to all the libellants. *The City of Norwich*, 575

BOTTOMRY.

Where a steamship, arriving in Antwerp from New York, was consigned to S., who took the agency of the vessel, put her up for passengers and freight, and paid bills for her, and the vessel was attached for a private debt due from her owner, and it became necessary to relieve the vessel from that attachment, in order that she might sail as advertised, and thereupon the master of the steamer executed a bottomry bond to S. for the amount of the claim of the attaching creditor, and also of the advances made by S. for the steamer:
Held, That inasmuch as the advances had been made without any agreement, or any reasonable expectation, that they were to be secured by bottomry, the bond was invalid as to that item;
That, although the design of the bond to release the ship from arrest, might be a ground sufficient to sustain the bond, yet, as it appeared that the master took no means whatever of communicating with the owner, although he could have done so by telegraph, (the arrival of the ship at Antwerp having been so announced to the owner,) he had no authority to bottomry the ship, and that S. was chargeable with notice of his want of authority, and the bond was invalid. *The Circassian*, 398

BURDEN OF PROOF.

See Bill of Lading, 6, 10.

C

CARRIER.

See Bill of Lading, 6, 10.

CASES CRITICIZED.

Seymour's Case (1 Ben. R. 348), 19
U. S. v. Gooding (12 Wheat. 460), 31
Caldwell v. The United States (8 How. 366), 124
The Metropolis (U. S. Circuit Court), 262
The New Jersey Steam. Nav. Co. v. The Merchants' Bank (6 How. 344), 266
Allen v. Newberry (25 How. 224), 267
Maguire v. Card (*id.* 248), 267
Marbury v. Madison (1 Cranch, 137), 316
United States v. Wilson (7 Pet. 150), 316
Cheang Kee v. The United States (3 Wall. 320), 504
Thompson v. Riggs (5 Wall. 663), 505

CHAMPERTY.

See BANKRUPTCY, 26.

CHARTER.

1. Where a vessel was chartered for a voyage from New York to Havana, for the sum of $2,900, payable in gold on the proper discharge of the cargo in Havana, of which sum $2,201.50 in gold had been paid:

   Held, That the owners of the vessel were entitled to a decree for $698.50, without reference to any premium on gold. *Baker* v. *Ward*, 499

2. Where a charter party of a vessel stated her to be "of the burthen of 427 tons, or thereabouts," but contained no other statement as to her carrying capacity:

   Held, That any other agreement as to her carrying capacity must be held to have been waived by the charterer, and that evidence of false representations by the owners as to her carrying capacity, and of the charterers being induced thereby to make the charter, was inadmissible. *Id.*

3. Where a charter party was signed by the libellant as master and agent of the vessel, and the charterers agreed in it to pay the charter money to him or his agent:

   Held, That a suit to recover the charter money was properly brought by the master alone, without joining the owners of the vessel as libellants. *Id.*

See NEGLIGENCE.

COLLISION.

STEAMERS.

1. Where a tow-boat was coming down the Hudson river, with a heavy tow, and her pilot saw lights ahead, which appeared to be arranged as if on a tow coming up, but which, when he approached, were changed, but he was not then able to avoid the object, which proved to be two wrecking vessels fastened together by beams, and anchored over a wreck:

   Held, That the tow-boat was in fault in approaching the object so near that she could not avoid it;

   That the wrecking vessels were substantially a single object, and, whether they were called on to exhibit the light provided by article 7, or that provided by article 9, of the Act of April 29th, 1864, should have exhibited but one light, or, if they exhibited two, the two should have been similarly arranged;

   That both vessels were in fault, and the damages must be apportioned, and the libellant must recover costs. *The Steamboat Austin*, 11

2. Where a steam-tug took in tow a schooner, to tow her out from a pier, next to which was a high balance dock, which shut off the view to the west, and, when the schooner got just clear of the pier, another tug was seen coming from the west with a barge in tow, which came in collision with the schooner:

   Held, That the tug having the schooner in tow was negligent, and liable for the collision;

   That, even if the other tug and the barge were in fault, that would not diminish the liability of this tug, especially as those vessels were not joined in this action *The Steam-tug C. Y. Davenport*, 63

3. The propeller D., bound to New York, was on the north side of the channel east of Execution Light in Long Island Sound, heading southwest by west, when she discovered, about a point on her port bow, both

the green and the red lights of the propeller M. S., which was also on the north side of the channel, heading northeast half north. The true course of the D., after passing the buoy at Execution Light, would have been southwest half south, but, as soon as she had passed the buoy, she ported her helm and blew one blast of her whistle. The answer to this was two blasts of the whistle from the M. S., to which the D. replied with a single blast, and immediately stopped and reversed her engine. The M. S. saw the lights of the D. a point or a point and a half on her starboard bow, she blew two whistles when about a mile off, and then, hearing the single whistle from the D., she again blew two whistles and starboarded, and, on hearing the second single whistle from the D., stopped and reversed her engine. Her first two whistles were not heard on board the D. The vessels came in collision, the stem of the D. striking the M. S. on her starboard bow:

Held, That the vessels were meeting end on or nearly so, and were both bound to port their helms, in accordance with the 13th Article of the Steering and Sailing Rules, and that the M. S. was in fault in starboarding;

That, if there is a confusion of signals between two approaching steamers, each vessel is bound to stop, as soon as it perceives the confusion, in accordance with the 16th Article;

That, the M. S. therefore, was in fault in not stopping and reversing her engine when she heard the first single whistle from the D., which she understood to be in answer to her first two whistles;

That, as each vessel saw the other at a sufficient distance, there was no question of lookout;

That the D. was not in fault. *The Propeller Mary Sandford—The Propeller Doris*, 100

4. Where a steamboat, having fourteen boats in tow, was coming up the Hudson River on a flood tide, and saw a steamship ahead, and about 2,000 feet off, coming down the river, presenting the bluff of her starboard bow, and blew two whistles as a signal to her to pass to her own left, and received no answer; and soon, seeing that the steamship had ported her helm, the steamboat, without altering her own helm, stopped, and reversed her engine, the effect of which, in the flood tide, was to cause the rear boats to spread out, so that they were thrown across the course of the steamship, which would otherwise have cleared them, but which struck the rear boat on the port side of the tow:

Held, That if the steamship was seen directly ahead of the steamboat, and presenting the bluff of her starboard bow, as claimed by the steamboat, the vessels would have passed clear, if both had kept on, and that Article 14 of the Rules for avoiding collisions was, therefore, on that theory, not applicable to the case;

That if it were, it was also the duty of the steamboat, under Article 18, to keep her course, and, that, having allowed her tow to spread out across the track of the steamship, she did not, in the sense of the statute, keep her course, and was negligent in so doing;

That the spreading out of the tow by the tide, was a necessary effect of her stopping, and was a special circumstance requiring a departure from Article 16, if that Article would otherwise have been applicable;

That under Article 20, the steamboat was liable for neglecting the precaution of keeping on without stopping;

That the steamship, having made the tow a little on her port bow, and having ported her helm, and having slackened her speed, and stopped and backed as soon as she saw, by the stopping of the steamboat, and the spreading out of her tow, that there was risk of collision, was not in fault. *The Pennsylvania*, 215

5. Where two steamers used the same pier, the State of New York, a large steamer running through the Sound, whose berth was at the side of the pier, and whose hour of departure was 4 P. M., and the Sylvan Stream, a small steamer which made rapid trips up and down the East river, coming in at about 4 P. M., and leaving at 4.15; and it was the usage of the lat-

ter on that trip, if she came before the former had started, to stop off in the stream and whistle, and, if the former did not answer or start, to come to the end of the pier and land her passengers before the former started; and, on one occasion, coming according to this usage and whistling, and receiving no answer, she started to come to the pier, and had almost reached it, when the State of New York started to come out, and, though her engine was stopped and backed, it was not done soon enough to prevent a collision, her stem striking the smaller steamer a square blow on the end of her shaft, and being at the time about three feet outside of the end of the pier:

Held, That the Sylvan Stream, having begun to make her landing before the State of New York had begun to move, was, under the circumstances, entitled to complete it without embarrassment from the latter;

That she was not bound, under the circumstances, to deviate from her usual mode of making the landing;

That the collision occurred from negligence on the part of the State of New York, in starting when she did, which happened because the pilot who started her, did so from aft, where he could not see ahead, and then walked forward to his post in the pilot-house, the vessel thus, for a short period, running right into danger, with no one to stop her. *The State of New York*, 253

6. A steamboat, whose berth was on the north side of a pier, was unable to get into it, and came to the end of the pier, and, for the purpose of making a landing, was backed down across a ferry slip on the south side of the pier, without any one on her stern to look out, and was run into by a ferry-boat, which was coming into the ferry slip:

Held, That the steamboat was in fault, in thus backing without keeping at her stern a proper lookout, and without paying attention to the approach of the ferry-boat;

That the ferry-boat was also in fault, in not stopping sooner, and in not approaching with greater caution, especially as her pilot saw that there was no one on the steamboat's deck noticing the ferry-boat's approach;

That the damages must be divided, and the libellant should have his costs. *The Paterson*, 299

7. Where two steamers, the F. bound into Hampton Roads, and the C. bound out, were approaching a guardship at which each was required to report, both vessels heading on courses nearly parallel with the keel of the guardship, and the C. had the guardship on her starboard side, and made the white and red lights of the F. on her port bow, and the F. then changed her course, by starboarding, and slowed and stopped her engine for the purpose of speaking the guardship, and blew two blasts of her whistle, but the C. kept on, and struck the F. on her starboard side and sank her:

Held, That the F. was in fault in not keeping a proper lookout, and also in changing her course across the bows of the C.;

That it was her duty to pass to the right, and let the C. pass between her and the guardship. *The Cumbria*, 334

8. The steamboat F. was going down the East river, with the ebb tide, and the ferry-boat A. was crossing from New York to Brooklyn, and heading up against the tide, so as to swing into her slip, in such a position that, if both vessels had kept on, the F. would have passed ahead of the A., and between her and the Brooklyn shore. The F. blew one whistle, and ported, whereupon the pilot of the A., seeing that, if both vessels kept on, the A. would be struck on her starboard side, also ported, and the two vessels came together nearly head on:

Held, That the F. was in fault, in porting, and attempting to cross the course of the A., and that the A. was not in fault. *The America*, 424

A steam vessel has no right to select for herself a particular course, and, by the use of her whistle, prescribe to another steam vessel a particular course, without regard to the Act for preventing collisions.

Art. 18 of that Act only applies when each vessel, by day, sees the masts or the line of the keel of the other in a line, or nearly in a line, with her own masts or the line of her own keel, and when, by night, each vessel is in such

a position as to see both of the side-lights of the other. *Id.*

9. A steamboat, the A., was going up the East river, against the ebb tide. Off her port bow or side was a ferry-boat, going the same way. The pilot of the A., seeing another ferry-boat, the L., coming down the river, a little to the starboard of his course, heading about two points on his course, and apparently crossing it, blew two whistles, and starboarded his wheel, and shortly afterwards stopped and backed his boat, but she was struck on her starboard side, by the starboard bow of the L., which, after seeing the sheer of the A., had also starboarded her wheel. The L. was coming down the river, at the rate of eleven knots an hour, with the tide, and her engine was slowed, stopped, and backed, before the collision, but not soon enough to stop her headway, while the A. was, at the time of the collision, about still in the water:

Held, That, on the evidence, the two vessels were meeting end on, or nearly so, when the two whistles of the A. were blown, and that, under the 13th article of the Act of April 29th, 1864, it was the duty of each to port her helm;

That if, as was claimed by the A., the L. was crossing her course from the starboard side, it was the duty of the A., under article 14, to have kept out of her way, and the duty of the L. to have kept her course;

That the A., therefore, should have stopped and backed before she blew her two whistles;

That the A. was not excused from the duty of porting her helm, by the law of the State of New York, requiring steamboats navigating the East river to keep in the middle of it;

That the A. was not excused from porting, under the 19th article of the Act of Apl. 29th, 1864, by reason of the presence of the other ferry-boat on her port bow, and danger of a collision between her and the L., if the L. kept on;

That the L. was also in fault, for running at too great speed, contrary to the 1st section of the Act of the State of New York, of April 12th, 1848;

That, independent of that statute, her speed was too great, and it was her duty, under article 16 of the Act of 1864, to have slackened her speed sooner than she did;

That, both vessels being in fault, the damages must be apportioned;

The question of costs was reserved till after the apportionment was made. *The George Law & The T. V. Arrowsmith*, 456

10. The steam tug E. W. Gorgus was intending to come out of the Atlantic Docks, the entrance to which is by a narrow gap between piers, on which are built warehouses which obstruct the view, except opposite the entrance. She blew her whistle, as a signal of her intention to go out, and, hearing no answering signal, entered the gap. She then discovered the steam tug W. S. Earle, coming into the dock, and at once stopped, but the two vessels came together:

Held, That, whether the failure of the Gorgus to hear any signal from the Earle arose from the fact that the latter gave no signal, or from the coincidence of the Earle's whistle with that of the Gorgus, in either case, there was no negligence on her part, and as no subsequent negligence was shown, the libel against her must be dismissed. *The E. W. Gorgus*, 572

See BANKRUPTCY, 10.
DAMAGES.
STALE CLAIM.

STEAMER AND SAILING VESSEL.

11. Where a collision occurred in the night, between a steamboat and a schooner, each party claiming that the other vessel sheered across the other's bows:

Held, That the fact that the sails of the schooner did not jibe, was sufficient to confirm the evidence from the schooner, that she made no change;

That the steward, who was standing by the companion way, and was no mariner, and had not been stationed as a lookout, was no proper lookout;

That the steamboat was in fault, in not having a proper lookout, and in not avoiding the schooner, and was liable for the collision. *The Gratitude*, 108

12. A schooner, heading about east southeast, on her starboard tack, with the wind from the south, on a bright starlight night, discovered a steamer's lights about two points on her port bow, and kept her course till a collision between the vessels was inevitable, when her helm was put to port. The steamer discovered the two colored lights of the schooner at from one and a half to two miles' distance, half a point on her starboard bow, and her helm was at once ported. The port bow of the steamer struck the port bow of the schooner, and carried away all the rigging on that side, so that she could not be brought up into the wind for fear of losing her masts, and she was anchored, and the next morning went ashore on Long Island:

Held, That, as the schooner did not change her course till the collision was inevitable, she was free from fault, and, no excuse having been shown by the steamer for not having avoided the schooner, the steamer must be held liable;

That the manœuvre of the steamer, in porting her helm, was faulty. Under the circumstances, she should have starboarded;

That the steamer was liable for the damages, including those consequent upon the stranding of the schooner. *The Cella*, 168

13. Where a ship and a steamer were both sunk by coming in collision at sea, the night being dark but starlight, the wind being from the north northwest, the ship sailing to westward close hauled on her starboard tack, about seven and a half knots an hour, and the steamer sailing ten to eleven knots, on a course stated by the officer of her deck to be east, and by her master to be southeast three-fourths east:

Held, That although evidence was given, on behalf of the steamer, estimating the distance of the ship, when she was first seen, at several miles, yet estimates of time and distance cannot be relied on, and are here overborne by the sequence of events stated by the witnesses, which shows that when the steamer's helm was first changed, it was got hard-a-port as soon as possible, and the engine at once stopped and reversed;

That, therefore, it must be concluded that the ship was not seen by the lookout as soon as she ought to have been, or if seen, failed to receive proper attention from the officer of the deck, of which last fact there was some other evidence in the case;

That if the ship was seen three or four miles off, as claimed, the steamer was in fault for not sooner stopping and backing, for the helm was shown to have been ported as soon as she was seen, and yet the witnesses testified that porting made no change in the bearing of the ship. It was her duty, under such circumstances, as soon as she discovered she was not shaking off the ship's light by porting, to have checked her speed, and ascertained which way the ship was sailing;

That on the evidence the fault charged against the ship, of not holding her course, was not made out;

That the lookout on the ship having been killed by the collision, and having been proved to have been on duty before the collision, and to have reported the lights of the steamer, no fault could be charged upon the ship in this regard;

That the owners of the steamer were liable for the damages occasioned by the loss of the ship in the collision. *Dyer* v. *The National Steam Navigation Co.* 173

14. Where a collision takes place between two vessels, neither of which had a proper lookout, it is most likely that both vessels were in fault.

Where it is not clear what particular fault or faults should be deemed to be the more immediate and real cause of the collision, the absence of a lookout, and the want of careful attention to his duties on the part of the officer in charge of each vessel may be considered to be the causes of the disaster.

Inability of the officer in charge of a steamer to give instant orders to the engineer, when a collision is impending, is negligence.

A change of course made by a sailing vessel, in accordance with a hail from an approaching steamer, cannot

be considered as a fault chargeable to the sailing vessel. *The Forest Queen*, 181

15. Where a schooner was beating through the East river, and went about without observing the approach of a large propeller, and she might have gone farther on before going about, and, after running about four lengths on such new tack, she struck the side of the propeller, 32 feet from the stern, with her bowsprit, head on, her master having done nothing, after she went about, to avoid the blow, and the propeller, which was going 8 or 9 knots an hour, having neither slowed nor stopped nor sheered:

Held, That the schooner was in fault in coming about without heeding the propeller, and when she could have kept on some distance farther;

That she might have slacked up in the wind till the propeller got by, or have fallen off when on her new tack.

That, if the propeller had slowed or stopped, she would probably have struck the schooner, and that she had not time to sheer, and was not in fault. *The Nereus*, 238

16. A lighter, loaded with casks of oil, was beating down the East river, which was crowded with vessels, the wind being southwest, and the lighter being on her port tack, and a steamer, coming up the river, saw the lighter before she came on that tack, and, on seeing her come about upon that tack, slowed her engine, and afterwards stopped it, but did not reverse it or change her course, and struck the lighter on the bluff of her port bow:

Held, That the fault of the collision was with the steamer, in plunging into the crowd of vessels, taking her chance of finding an opening through them;

That the lighter was entitled to keep her course, and did so, and did nothing to embarrass the steamer, and was not in fault. *The Vicksburg*, 298

17. Where a propeller attempted to pass close by a sloop, and just as she was passing, a puff of wind caught the sloop's sail, and her boom swung out, and the propeller struck it, receiving damage:

Held, That the propeller, having attempted a dangerous and uncalled-for manœuvre, must bear the consequences of it. *The George Law*, 396

SAILING VESSELS.

18. Where a schooner, heading south southwest with the wind northwest, saw a pilot boat about a mile and a half off and about two points on her port bow, and the pilot boat, which was lying to, under a reefed mainsail and a jib with one bonnet out, and with her helm lashed to starboard, was heading about north, and making about a mile an hour, luffing up so as to cause her sails to shake and then falling off, and the schooner kept on without changing her course, although this luffing up and falling off of the pilot boat was seen several times, until the pilot boat, when about eighty yards off, took another luff across the bows of the schooner, which then, but too late, starboarded her helm:

Held, That, under the 12th article of the Act of April 29th, 1864 (13 *Stat. at Large*, p. 60), it was the duty of the schooner to keep out of the way of the pilot boat, because the latter, though having the wind on her port side, was close-hauled;

That the schooner was in fault in not sooner changing her course;

That the pilot boat was bound, under Article 18, to keep her course, but she kept no course at all. It was her duty, when the schooner was seen approaching, to have unlashed her helm and kept steady on a course;

That the damages must be apportioned between the two vessels. *The Transit*, 192

19. Two schooners, the Barney and the Bronson, came in collision in Lake Huron. They had been sailing, the Barney west by north half north, on her port tack, and the Bronson southeast by east half east on her starboard tack. Each claimed that she was close-hauled, and that the other had the wind free. The helm of the Barney was starboarded and that of the Bronson ported, when a collision was seen to be inevitable. The evidence as to the wind was conflicting, and without preponderance in favor of one side or the other; and it was agreed by both parties that the case must be

determined by the 12th Article of the Act of 1864, as being one of vessels crossing:

Held, That, under that article, the Barney must prove satisfactorily, in order to recover full indemnity, that she was close-hauled and that the Bronson was free, and that she had failed to do this;

That, it being impossible, on the pleadings and proofs, to determine the direction of the wind, or which vessel was close-hauled, the case might be properly considered as one of mutual fault, or of inscrutable fault;

That in either case the damages must be divided;

That the case was, more properly, one of vessels meeting instead of crossing, the green light of the Bronson having been seen a point or a point and a half off the Barney's starboard bow, and both lights of the Barney having been seen about half a point off the Bronson's port bow;

That the case should, therefore, be determined under the 11th Article, instead of the 12th, and as neither vessel ported her helm until the collision was inevitable, both vessels were in fault and the damages must be divided.
The Tracy J. Bronson, 341

20. A vessel, sailing free, and meeting a vessel beating, has no right, by going ahead, instead of astern of the vessel beating, to compel the latter to go about before beating out her tack.
The Mary Eveline, 438

Where, in a narrow channel, a sloop sailing free, and able to take either side of the channel, met two schooners beating close to each other, and taking the chance of passing them before or after they should tack, attempted to pass ahead of them, and was in the act of passing, where she could neither luff nor keep off, when the rear schooner came into the wind, and so was run into by that schooner:

Held, That the sloop was in fault for placing herself in such a position, when she had no room to pass. She should have gone astern of the schooners before they tacked. *Id.*

21. A steamer and a schooner collided on Long Island Sound, in the night. The steamer was bound from New York to New Haven, and the schooner was close-hauled, on a course nearly at right angles with the steamer's course, and kept that course unchanged. The steamer also kept her course unchanged, until close upon the schooner, which she did not see, as she claimed, until it was too late to avoid her:

Held, That, if the schooner was not seen, as claimed by the steamer, until it was too late to allow of any change of her course, there was negligence on the part of those in charge of the steamer, in not seeing her sooner.
The City of Norwich, 575

AT PIER AND AT ANCHOR.

22. A bark and a barge were both moored alongside a pier. The bark's long boat was hanging under her counter, close down to the water, from lines run from the stern, there being no davits. A floe of ice came into the slip, and parted the barge's lines, and drove her against the long-boat, and crushed it:

Held, That the barge was in fault, in not being properly moored;

That the bark was in fault, in reference to the position of the boat;

That the damages must be divided.
The Avid, 434

23. A British steamship, coming into the harbor of New York, was swung by the ebb tide, which forms a rip where the tides from the North and East rivers meet, against an Austrian ship, lying at anchor, and sank her. The ship had come in from sea the day before, and had anchored where she was sunk, and no notice to remove from that anchorage had been given to her by the harbor masters:

Held, That the Court of Admiralty was not called upon, by the fact that all parties concerned were foreigners, to decline, from motives of international comity, to exercise jurisdiction in the case;

That the effect of the tide upon the steamer was not an inevitable accident;

That, the ship being anchored in a customary place, and where no State law or city ordinance forbade anchoring, any general regulation of the harbor masters, forbidding her to anchor

there, must be held to have been waived in her behalf, by the failure to give her notice to remove;

That the ship having come in from sea in a seaworthy condition, the fact that she was sunk by the blow of the steamship did not establish that she was not "tight and strong." *The Russia*, 471

24. A canal-boat was moored at a bulkhead, by lines sufficient to enable her to withstand all the ordinary forces of wind and tide. A large propeller, with a screw 11 feet 9 inches in diameter, was lying at the pier, with her stern towards the canal-boat, and 40 to 75 feet distant. A short time before the sailing of the propeller, her engine was put in motion, making about 80 revolutions a minute. This was done without any notice to the canal-boat, and the current made by her screw parted the canal-boat's fasts, whirled her round in the slip three times, and drove her against the bulkhead, with such force as to sink her:

Held, That the propeller had no right to set in motion such a current of water, in a crowded slip, without, in some way, notifying vessels likely to be affected by it, so as to give them opportunity to protect themselves from it, by getting out extra fasts, and that the propeller was liable for the damages.

The question being a new one, no costs were awarded against the propeller. *The Leo*, 569

25. A tow-boat, with thirty canal-boats, four barges, and a sloop in tow, was bound down the North river, with an ebb tide. In passing a large steamer, which lay at anchor, the hawser tier struck the steamer, and two of the canal-boats were sunk. The defence set up was, that a sudden squall of wind struck the steamer, as the tow was passing at a proper distance, and drove her into the tow:

Held, That the defence had not been made out, but that the collision was occasioned by lack of precaution on the part of the pilot of the tow-boat. *The Alida*, 580

CONSTITUTIONAL LAW.

See PARDON.

CONVERSION.

See PRACTICE (BANKRUPTCY), 21.

CORPORATION.

See SALVAGE, 3.

COSTS.

1. Where, in a collision, a reference was had, and both parties excepted to the Commissioner's report, and the libellant's exceptions were all overruled and the claimant's principal exception was allowed, and it appeared that the evidence before the Commissioner related almost wholly to items which were disallowed:

Held, That, the costs of the reference and of the exceptions should be allowed to the claimant, but the costs of the cause, to and including the interlocutory decree, should be allowed to the libellant;

That, if the difference between the two bills of costs was in favor of the libellant, it should be added to his recovery, but, if in favor of the claimant, it should be deducted from the recovery, or, if larger than the recovery, the latter should be deducted, and the claimant have a decree for the remainder. *The Baltic*, 195

2. Where bankrupts surrendered their property to a Register, and thereafter, by order of the bankruptcy Court, custodians were appointed and were directed to sell certain goods at retail, paying over the proceeds to the Register daily, which was done during twenty-five days, in which time $15,000 was so received by the Register:

Held, That, the Register was entito be paid $5 a day, under section 47 of the bankruptcy Act, and the percentage on the $15,000 allowed to assignees by section 28. *Loder Brothers' Case*, 211

3. Where a petition in involuntary bankruptcy is dismissed, with costs as against the petitioner, the petitioner's debt against the bankrupt will not be allowed to be set off against the costs.

In order to the taxation of charges by the marshal for the keeping of property in such proceedings, under the 47th section of the bankruptcy Act, it must be shown that such ex-

penses are just and reasonable, and have been actually incurred and paid by the marshal. *Lowenstein's Case*, 422

4. Costs not allowed for illegible depositions. *The Avid*, 434

5. The proviso in the 91st section of the Act of Congress of March 2d, 1799, (1 *Stats. at Large, p.* 697,) that where the value of the property forfeited is less than $250, the share of the United States is to be applied towards the costs of the prosecution, is general in its application, and is applicable to forfeitures under the internal revenue laws.

Treasury regulations on that subject, issued under the authority of the 9th section of the Act of July 13th, 1866, (14 *Stats. at Large, p.* 145,) are not binding in cases which come within that proviso. *One Large Water Tub, &c.*, 436

See COLLISION, 1, 6, 9, 24.
DAMAGES, 2.
PILOTAGE.
SALVAGE, 2.

COUNTERFEITING.

See STATUTE, 1.

D.

DAMAGES.

1. In estimating the damages caused by a collision, interest at six per cent. on the sum paid for the repairs of the injured vessels, is to be added.

To recover demurrage, the party must show, by evidence, that he sustained loss of service of his vessel, and that he sustained damage by such loss.

Where, in a suit brought to recover damages for collision, the Court held both vessels in fault, and that the damages must be apportioned and ordered a reference to ascertain the damages, and the Commissioner reported an amount as "due to the libellant:"

Held, That the Commissioner should have reported that sum as "the damages sustained by the libellant by reason of the collision," and that the report should be amended accordingly. *The Baltic*, 195

2. Where a canal-boat, laden with coal, was sunk by a collision in the port of New York, and, after she was raised, her cargo was taken out and sold at private sale, without notice to the parties to be charged for the damages; and the boat was then taken to Elizabethport, N. J., to be repaired, where she was frozen in, so that she could not be repaired for over a month, and no sufficient reason was shown for taking her from New York to be repaired, and the Commissioner, to whom it was referred to ascertain the damage, allowed demurrage for the whole time, and also an item of loss on the coal, and the claimants excepted to this report:

Held, That the owners of the boat could not recover demurrage for all the time of the delay, but only for a period of time sufficient to complete the repairs, under ordinary circumstances;

That the damage to the coal should have been ascertained by an appraisal, or by a sale upon notice; but as it appeared that the cargo was, in fact, damaged, and that a sale at auction would probably have shown as much loss as was allowed, the Court allowed the item to stand, marking its disapproval of the course pursued, by casting on the libellant the fees of witnesses called to prove that item. *The Thomas Kiley*, 228

Where a canal-boat, with a cargo of coal on board, lying at a pier in the harbor of New York, was struck by a steamship and sunk in thirty feet of water, and it was not possible to ascertain the amount of her injury as she lay, and her owner contracted to have her raised for $500, and she was raised and put upon ways, and then, on an examination and survey, it was found that she was not worth repairing, and she was sold at auction for $100:

Held, That the owner of the canal-boat was entitled to recover as damages the value of the boat as a total loss, deducting the sum for which she was sold, and, in addition, the cost of raising the boat, and of putting her on the ways to be examined after she was raised. *The Nebraska*, 261

See COLLISION, 12.
NEGLIGENCE.

DEMURRAGE.
See DAMAGES, 1, 2.

E.

EMBEZZLEMENT.
See NAVY.

ENLISTMENT.

A writ of *habeas corpus* was issued on the petition of the wife of F., to inquire into the regularity of the enlistment of F. into the army of the United States. The discharge of F. was claimed on three grounds—(1) That the oath of enlistment taken by him was taken before an officer of the army, and not before a civil magistrate, whose services could easily have been obtained; (2) That he had a wife and child when he enlisted, and his enlistment was, therefore, contrary to paragraph 930 of the Rules and Regulations for the Recruiting Service of the Army of the United States, prescribed by the Secretary of War, which were claimed to have the force of a statute, under the 37th section of the Act of July 28th, 1866 (14 U. S. Stat. at Large, p. 338); (3) That he was intoxicated when he enlisted:

Held, That the wife of F. might prosecute the writ;

That the oath taken by F. was substantially the oath prescribed by the 18th section of the Act of Jan. 11th, 1812, (2 U. S. Stat. at Large, p. 673,) and not that prescribed by the Act of April 10th, 1806, (*id.* p. 361);

That the Act of January 11th, 1812, contained no provision requiring the oath to be taken before a civil magistrate;

That the "oath of enlistment" mentioned in the 3d section of the Act of June 12th, 1858, (11 U. S. Stat. at Large, p. 336,) and the "oath of allegiance" mentioned in the 11th section of the Act of August 3d, 1861, (12 *U. S. Stat. at Large*, p. 289,) are the same, and that, under the latter Act, the oath taken by F. was properly administered by a commissioned officer of the army;

That, as the 37th section of the Act of July 28th, 1866, authorizes the Secretary of War to report a Code of regulations "for the regulation of the army and of the militia in actual service," embracing "all necessary orders and forms of a general character for the performance of all duties incumbent on officers and men in the military service," such regulations could not be held to apply to the question as to who may lawfully be enlisted into the army; nor were existing regulations on that subject made statutory by the provision in that section, that "existing regulations are to remain in force until Congress shall have acted on that report;"

That, therefore, the 1st section of the Act of December 10th, 1814, (3 U. S. Stat. at Large, p. 146,) which authorizes the enlistment of "any free, effective able-bodied man, between the ages of 18 and 50 years," was not by implication repealed by the 38th section of the said Act of 1866;

That paragraph 930 of the Regulations above referred to was, therefore, only a regulation of the War Department, directory to its subordinates, and the fact that F. had a wife and child did not invalidate his enlistment;

That, moreover, as, when he enlisted, he signed a declaration that he had neither wife nor child, and as he had received the rations and clothing of a recruit, and had performed the duties of a recruit for twenty days, when the petition for a *habeas corpus* was presented, he must be held to have ratified his contract of enlistment;

That he was not intoxicated when he enlisted;

That the writ must be discharged, and the recruit be remanded. *Ferrens' Case*, 442

ENROLMENT.

Where a canal-boat was not enrolled or licensed, and had no documents:

Held, That the failure of the master to exhibit such enrolment or license when demanded, did not subject the vessel to the penalty provided by the 13th section of the Act of February 18th, 1793 (1 *Stat. at Large*, 309). *The Canal-boat John J. Wiltsie*, 251

ESTOPPEL.

See BANKRUPTCY, 8.

EVIDENCE.

1. Where it appeared that a party

to a suit had made contradictory oaths:

Held, That that one must be taken as true which bore most strongly against him. *Farrell* v. *Campbell*, 8

2. The question, what are proper books of account to be kept by a merchant or tradesman, is in each case a question of evidence. *Newman's Case*, 20

3. The fact that the mizzen sail of a vessel gave out in an extraordinary storm, and that she had no spare mizzen sail, does not show that she was unseaworthy when she sailed. 800 *Bales of Cotton*, 42

4. Where a party to a suit has in his possession evidence which he can give to clear up any doubt, and he does not give it, there is a presumption that the evidence, if given, would corroborate that which has been given against him. *A Quantity of Distilled Spirits*, 70

5. The fact that spirits are purchased for less than the amount of the tax upon them is sufficient evidence, in the absence of any explanatory circumstances, to show that the purchaser could not have believed that the tax was paid. *Id.*

6. Affidavits and statements previously made by witnesses, which contradict their evidence given on the stand, are to be considered by the jury for the purpose of finding out what is the truth; but the evidence of the witnesses on the stand is not necessarily to be rejected on account of such contradiction. If, after having ascertained what is the truth, the jury find that a witness has wilfully told a falsehood on the stand, as to a material fact, they have a right to believe that he is not worthy of credit in any particular. *The United States* v. *Blaisdell*, 132

7. The fact that a libellant, on October 24th, 1867, on the entry of certain goods by him at the Custom-House, made oath that the goods then belonged to a house in Switzerland, is not evidence to show that the libellant did not own the goods when a libel to recover damage for their loss was filed, on December 27th, 1867. *The Ville de Paris*, 276

8. Every one is supposed to intend the natural consequences of an act committed by him. *H. E. Dibblee & Co's Case*, 283

9. Courts of admiralty are not bound by the rules of evidence which are applied in the courts of common law, and they may, where justice requires it, take notice of matters not strictly proved. *The J. F. Spencer*, 337

10. Where copies of papers pertaining to the condemnation and sale of the vessel, certified by the British consul to be copies of official documents on file in his office, had been proved by deposition a considerable time before the trial, so that the parties were not taken by surprise:

Held, That they were admissible in evidence in the admiralty. *Id.*

11. Questions to a bankrupt, who was under examination by a creditor, whose debt was incurred in 1856, as to property held by the bankrupt previous to that time, but which he claimed to have belonged to his wife, are proper. *Craig's Case*, 353

12. When a creditor accepts a security for his debt, he is conclusively presumed to know what appears upon its face, and to have reasonable cause to believe it was intended to accomplish what must be its ordinary and necessary effect. *Graham* v. *Stark*, 520

13. The law requires the best evidence to be given of any fact. *Six Cases of Silk Ribbons*, 536

14. A series of sales or a single sale in the ordinary course of trade, is one of the best evidences of market value.

Offers by merchants or manufacturers to sell their goods in the usual course of trade are among the best evidences of their market value. *Id.*

See BANKRUPTCY, 6.
FRAUD.
IMPORT ACTS.
INT. REV. LAW, 3, 6, 7.
PRACTICE (BANKRUPTCY), 23.

EXECUTIVE DEPARTMENT.

The Court can communicate with the Executive authorities of the Government, only through the District Attor-

ney as the recognized officer of the Government. *The United States* v. *Blaisdell*, 132

F.

FORFEITURE.

1. The seizure of enemy property as prize of war on land is not authorized by the law of nations, and can only be upheld by the municipal laws of the nation which seeks to enforce the forfeiture. *The United States* v. *Stevenson*, 119

2. Where a statute denounces a forfeiture of property as the penalty for an offence, and does not say that the property *or its value* is forfeited, the forfeiture takes place at the time the offence was committed, and operates as a statutory transfer of the right of property to the Government. *Id.*

3. The Act of July 13th, 1861, (12 *Stat. at Large*, 255,) was not a mere temporary Act. Forfeitures incurred under it during the continuance of hostilities might be enforced afterwards. *Id.*

4. The 5th and 9th sections of that Act must be construed together, and the forfeiture declared in the 5th section can be enforced only by a seizure of the property. *Id.*

5. The Act of August 6th, 1861, (12 *Stat. at Large*, 319,) May 20th, 1862, (*Id.* 404,) and July 17th, 1862, (*Id.* 589,) are subject to the same construction, and forfeitures under them can only be enforced by a seizure of the property. *Id.*

FRAUD.

Fraud is hardly ever made out by direct evidence, but by the interweaving of circumstances. *Rathbone's Case*, 50

See BANKRUPTCY, 5, 11.
CHARTER, 2.

FREIGHT.

See BILL OF LADING, 1, 3, 9.

G.

GOLD CONTRACT.

See BILL OF LADING, 9
CHARTER, 1.
LIEN, 1.

H.

HABEAS CORPUS

A *habeas corpus*, to bring before a prisoner confined under s the Penitentiary on Blackwe is properly directed to the the Penitentiary. *De Puy's*

See PRACTICE (BANKRUPTC
ENLISTMENT.
INT. REV. LAW, 7.

HUSBAND AND WI

Where a wife having receiv from her father's estate, pu husband's hands, with the derstanding that she was when she wanted it, and drew all but $700, and i that the husband had at va given her furniture and taken out policies of life in her benefit, and her hus some seven years after the the money, declared a ban

Held, that the wife was prove the $700, without ir debt against her husbar *Bigelow's Case*,

See BANKRUPTCY, 28.
PRACTICE (BANKRUP

I.

IMPORT ACTS.

Under the Act of March 3 Stat. at Large, 737,) wher ported from abroad are ow manufacturer, he must sw invoice contains the ac value of the goods, at th place when and where the ufactured. *Six Cases of S*

"Actual market value," is t which the manufacturer

goods for sale in the ordinary course of trade. *Id.*

The time when an article is manufactured is when its manufacture is completed. *Id.*

The law presumes that there was, at such time and place, an actual market value, and no evidence can be received, in an action to forfeit the goods for fraudulent undervaluation, to show that there was no such value. *Id.*

In an action to forfeit goods for fraudulent undervaluation, the jury have the right, in the absence of proof of such sales or offers, to resort to the cost of manufacture, with the manufacturer's profit added, as a means of determining what was their actual market value. But, in that case, the cost of the raw material is to be taken as of the time and place of manufacture. *Id.*

Any intentional undervaluation is cause for the forfeiture of the goods; and the intentional undervaluation of any item in an invoice authorizes the forfeiture of the whole invoice. *Id.*

Where the Court decides that probable cause has been shown for the seizure of the goods as so forfeited, the burden is upon the claimant to show that the invoice contains the actual market value of the goods. *Id.*

IMPRISONMENT.

A prisoner was sentenced to imprisonment for a year at Blackwell's Island, in pursuance of which the marshal delivered him into the custody of the keeper of the Blackwell's Island Penitentiary:

Held, That the sentence did not direct him to be imprisoned in any particular State prison or penitentiary, and that he was properly delivered to the custody of the keeper of the Blackwell's Island Penitentiary, whether he was imprisoned by virtue of the direct sentence of the Court, or by virtue of the Rule of the Circuit Court on the subject, (4 *Blatchf. C. C. R.*, 541).

That such prisoner was, under the Act of Congress of June 30th, 1834, (4 *Stat. at Large*, 739,) exclusively under the control of the officers having charge of such penitentiary. *De Puy's Case*, 307

See POWER OF THE COURT, 3.

INFORMER.

Where an inspector of internal revenue at Philadelphia, appointed under the fifth section of the Act of June 30th, 1864, made researches there as to sales of tobacco made by merchants at New York to customers in Philadelphia, which researches were embraced within his duties as such inspector, and were discharged in co-operation with, and under the direction of, officers of the Internal Revenue at New York:

Held, That information so obtained by him never became, as against the United States, his private property, so as to allow him any discretion as to withholding it from his superior officers, and that he was not entitled to share as informer in forfeitures resulting from violations of the Internal Revenue Law which he thus discovered, and of which he gave information. *Four Cutting Machines*, 220

INTERNAL REVENUE LAWS.

1. Under the 27th section of the Internal Revenue Act of July 13, 1866 (14 Stat. at Large p. 162), the proper person to give the warehouse bond there provided for is the person who, under the 24th section, gives the notice to the Government that he is the person engaged in the business of a distiller, at the distillery in question. *The United States* v. *Henry*, 29

2. Under the 26th section of the Internal Revenue Act of July 13th, 1866, rectifiers were bound to keep the book prescribed by that section and make the proper entries in it, whether the Commissioner of Internal Revenue had prescribed any rules and regulations on the subject or not. *A Quantity of Distilled Spirits, &c.* 70

3. Where a rectifier had kept a book as prescribed by law, and had himself made an entry in it of a certain purchase, which entry did not comply with the requirements of the Act, but he gave no evidence to explain the discrepancy:

Held, That the jury must take anything doubtful about the entry most strongly against him. *Id.*

4. Where spirits were proved to have been found upon a rectifier's premises, and no proof was given that the tax had been paid:
Held, That the jury were to assume, as matter of law and as matter of fact, that the tax had not been paid. *Id.*

5. The 48th section of the Internal Revenue Act of June 30th, 1864, is not ambiguous, nor is the statute a penal one. *Id.*

6. The fact that spirits were properly branded by United States Inspectors is not evidence that the taxes on them had been paid. *Id.*

7. Where a tobacco manufacturer was summoned by an assessor of Internal Revenue to appear and produce all books of account containing entries relating to his business, and failed to obey the summons, whereupon an attachment was issued by a United States Commissioner against him, and he was arrested and committed by the Commissioner to the custody of the marshal till he should produce the books, whereupon a writ of *habeas corpus* was issued in his favor, on the hearing on which he claimed that a criminal proceeding had been commenced against him for making false returns to the assessor and that he could not produce the books or give the evidence without criminating himself:
Held, That he must bring the books which contained entries relating to his business before the assessor, and must then be asked to exhibit any entry relating to a particular point to be named in the inquiry, and, if he should say that he could not do so without criminating himself, he would be protected from exhibiting it. *Lippman's Case*, 95

8. Under the 45th section of the Internal Revenue Act of July 13th, 1866, (14 *U. S. Stat. at Large p.* 163,) the "place where spirits are distilled" is the distillery premises.
Under that section, a person cannot be convicted as a principal in removing spirits, and also as an aider and abettor in the same offence.
Under that section, any one who had an interest in the distillery, if he directed, ordered or set on foot the removal of spirits, may be convicted of such removal, though not personally present.
Any one personally concerned in handling the means of removing spirits is guilty of removing spirits, whether he is interested in them or not.
Any help or assistance, other than what is a removal, is an aiding in a removal; and giving any encouragement or instigation to commit a removal, other than what is defined to be a removal or an aiding in a removal, is an abetting in a removal. *The United States* v. *Blaisdell*, 132

9. It is no defence to an action by the Government, upon a bond given by a tobacco manufacturer, to recover an amount of duties, that the Government seized the manufacturer's goods as forfeited, instead of distraining upon them for the tax.
Laches is not to be imputed to the Government in such a case. *The United States* v. *Borrowcliff*, 519

10. Empty barrels were found on the premises of a rectifier, on which were stamps which had not been cancelled as required by the 43d section of the Internal Revenue Act of July 20th, 1868 (15 Stat. at Large, 125):
Held, That if the rectifier knew that the stamps were not cancelled, and it was his will, freely exercised, that they should not be cancelled, when the barrels were emptied, then he had "knowingly and wilfully" neglected to comply with the 43d section, and under the 96th section of the same Act, all distilled spirits or liquors owned by him were forfeited. *A Quantity of Distilled Spirits, &c.* 552
A rectifier must himself make the entries in the book required by the 45th section of the same Act, and his failure to do so subjects him to a similar penalty. *Id.*

See COSTS, 5.
INFORMER.

INTERNATIONAL COMITY.

See COLLISION, 22.

J

JUDGMENT.

See LIEN, 1.

JURISDICTION.

1. A Bankruptcy Court has jurisdiction to restrain parties who are proceeding in a State Court, by action commenced after an adjudication in bankruptcy, to enforce a mortgage upon property in the possession of the assignee in bankruptcy, which mortgage the assignee claims is void. *The Kerosene Oil Company's Case,* 35

2. A Court of Admiralty has no jurisdiction of a suit *in rem* against a ship, to recover for work, labor, and materials done and furnished towards the building of the ship, even though the law of the State gives a lien upon the ship therefor. *The Norway,* 163

3. Where a libel was filed against a vessel upon a contract to carry cargo on board of her from New York city to Troy, in the same State, to recover damages for an injury, from negligence, received by the cargo on the voyage, the owners of the vessel and cargo all being residents of New York State:

   Held, That the cause was one of admiralty jurisdiction. *The Leonard,* 268

4. A suit against a vessel to recover a penalty for the importation of goods in her without their being entered on her manifest, under the 24th section of the Act of March 2d, 1799 (1 *Stats. at Large, p.* 646), and the 8th section of the Act of July 28th, 1866 (14 *Stats. at Large, p.* 180), is a civil case of admiralty and maritime jurisdiction, within the jurisdiction of the Court, because the subject-matter is maritime in its nature. *The Missouri,* 508

See APPEARANCE.
PRACTICE (BANKRUPTCY), 3.
PILOTAGE.
SALVAGE, 5.

JUROR.

See PRACTICE (CRIMINAL), 1, 2.

L

LACHES.

See INT. REV. LAW, 9.

LIEN.

1. Where a vessel put into the port of Maranham, in distress, being foreign to that port, her master being without means to pay for the repairs, and her owners being without credit, and thereupon the libellants advanced to the master, towards the payment of the expenses of the vessel, $4,387.70, on the request of the master, and on his promise that it should be repaid in gold, in the United States, for which sum the master gave a draft on his owners, payable in gold, which draft was not taken in payment:

   Held, That the libellants had a lien upon the vessel for the amount of the advances;

   That, in conformity with the decision in *Bronson* v. *Rodes* (7 *Wallace,* 229), a decree must be entered in favor of the libellants, against the vessel, for $4,387.70, in gold, with interest and costs. *The Emily B. Souder,* 159

2. Where a libel was filed against a vessel, to recover for supplies furnished to her, and the vessel, having been seized under process issued on the libel, was, on the 10th of July, 1857, discharged on a bond given without notice to the libellants, the practice of the Court at that time not requiring such notice, and, on the 4th of March, 1858, the libellants, on consent of the claimants, discontinued the cause, paying the costs of the action, and, on the same day, filed another libel against the vessel for the same cause of action:

   Held, That the vessel was discharged of the lien for the supplies by the giving of the bond in the first suit, and was not liable to the second action. *The Thales,* 327

3. Where supplies were furnished, in the port of New York, to a vessel which hailed from a British port, carried the British flag, and was intending to proceed to a foreign port to be sold as a British vessel, the supplies being furnished on the order of the owner, but on the credit of the vessel, and being charged to her:

   Held, That her owner could not be permitted to claim that she was a domestic vessel, even though it had been proved that her owner resided in New York;

That the vessel was liable for the supplies. *The Walkyrien*, 394

4. A lien, to be recognized by the bankruptcy Court, as a valid lien on property which passes from the bankrupt to the assignee in bankruptcy by virtue of the proceedings in bankruptcy, must be a lien at the time of the commencement of those proceedings. *Dey's Case*, 450

5. A bankrupt filed his voluntary petition on May 17th, 1869. Among the property which passed to the assignee were buildings and machinery situated in New Jersey, upon which work had been done prior to May 17th, 1869, for which mechanics' liens were claimed on the buildings, under the laws of New Jersey, the earliest claim of such lien, however, being filed on May 29th, 1869. The assignee in bankruptcy filed a petition asking for a determination as to the validity of the claims of lien:

Held, That under the mechanics' lien law of New Jersey, the lien did not exist as a lien upon the property at the time of the commencement of the bankruptcy proceedings;

That the assignee must distribute the estate without reference to the mechanics' liens, as such. *Id.* 450

6. Liens upon a ship are necessities of her existence and usefulness. They are to her what credit is to a merchant. *The Missouri*, 508

See BANKRUPTCY, 10.
JURISDICTION, 2.
SALE OF VESSEL.

M

MASTER.

See CHARTER, 3.
NEGLIGENCE.
VOLUNTARY STRANDING.

MORTGAGE.

Where a mortgage of goods and chattels, made as security for a debt, in good faith and for a present consideration, within the 14th section of the bankruptcy act, and not invalid as made in violation of any law of the State of New York, or of the United States, was duly executed, covering property partly in New York and partly in New Jersey, and was duly recorded in New York, but was not duly recorded in New Jersey:

Held, That, the property in New Jersey must be regarded as not embraced in it, but, that that fact did not affect its validity as regarded the New York property. *The Soldiers' Business, Messenger & Dispatch Co's Case*, 204

See BANKRUPTCY, 28.
PRACTICE (BANKRUPTCY), 21.

N

NAVY OF THE UNITED STATES.

A paymaster's clerk in the navy is "a person in the naval forces of the United States," within the meaning of the first section of the Act of March 2d, 1863, (12 *Stat. at Large*, p. 696,) and if he embezzles funds of the United States, he is not liable to the penalty provided in the third section of that Act, but is liable for the amount embezzled. *The United States v. Bogart*, 257

NEGLIGENCE.

A vessel was chartered to bring a cargo of oranges from Havana to New York, and, her sails being insufficient, she lost time on the voyage, and, on arriving off Cape May, put in, in anticipation of heavy weather, and came to anchor, and her master failed to keep a careful watch at night, and, the wind coming around so as to blow on shore, the chain parted and the vessel went ashore, the master's excuse for not dropping another anchor being that ice had formed on his decks, from snow which fell the evening before, so that the second anchor and chain were covered up by ice, and could not be let go. The deck-load was discharged for the purpose of getting the vessel off, and the vessel was then got off and came to New York, without taking the deck-load on board again, and it was afterwards sent to New York by railroad and there tendered to the charterers, who refused to receive it, (it having been frozen and damaged,) and filed a libel against the vessel, to recover damages

for the non-fulfilment of the charter-party:

Held, That the vessel was chargeable with fault in not having her sails in proper condition, whereby the voyage was delayed;

That, the delay of the vessel being a fault, it was to be presumed against her that, but for that delay, she would not have been obliged to run into Delaware Bay, and the disaster there would not have occurred;

That the master was negligent in not keeping a vigilant watch while at anchor, and in not being prepared to drop a second anchor when the chain parted;

That the freezing and consequent injury to the deck-load must, therefore, be attributed to the vessel;

That she was chargeable with the injury to the deck-load, and with any damage sustained by the charterers, by the loss of any portion of her cargo by decay, arising from the delay of the vessel on the voyage. *The Thomas Jefferson*, 302

See TOW-BOAT AND TOW, 2.

P

PARDON.

1. Under the Constitution and laws of the United States, a pardon must be regarded as a deed, to the validity of which delivery is essential.

A pardon differs in that respect from a commission.

Until a pardon is delivered, it may be revoked. *De Puy's Case*, 307

2. A pardon for a prisoner sentenced to imprisonment for a year at Blackwell's Island, and under that sentence imprisoned in the Penitentiary on Blackwell's Island, was made out and signed by the outgoing President of the United States, on the 3d of March, 1869, and was transmitted on that day by the Department of State to the marshal of the Southern District of New York, and received by the marshal on the 5th of March, and, on the 6th of March, the incoming President directed the Secretary of State to order the marshal, if the prisoner had not been released, to consider the pardon as cancelled, and to return the same, which the marshal did, and, on the 8th of March, the President signed an order, reciting that the pardon had not been delivered, and ordering that the pardon be revoked and withdrawn; and thereafter, on *habeas corpus*, directed to the warden of the penitentiary, the prisoner was brought before this court:

Held, That, as the pardon had never been delivered to the warden, it had not been delivered to the prisoner, and the incoming President had the power to cancel it, as the President who signed the pardon would have had. *Id.*

PARTIES.

See CHARTER, 3.

PARTNERSHIP.

See BANKRUPTCY, 18, 21.

PENALTY.

It is not a necessary preliminary to a suit against a ship to recover a penalty for the importation of goods on board of her which are not on her manifest, that the ship should have been seized, or that proceedings to recover the penalty should have been instituted against the master or the owner personally. *The Missouri*, 508

See ENROLMENT.
NAVY OF THE UNITED STATES.

PILOTAGE.

Where a pilot boarded a ship, some thirty miles from Barnegat, and the master of the ship proposed that his employment should not commence till the vessel reached pilot ground, whereupon the pilot went to bed, and was called when Sandy Hook hove in sight, and then took charge of the vessel, and thereafter libelled her for the amount of off-shore pilotage, awarded by the laws of the State of New York:

Held, That the Court had jurisdiction of the action;

That the libellant could only recover for in-shore pilotage, and that, as the amount of in-shore pilotage had been tendered before suit, the decree must be without costs. *The Alaska*, 391

PLEADING.

1. The general rule is that, in an indictment for an offence created by statute, it is sufficient to describe the offence in the words of the statute. If the defendant insists upon greater particularity, it is for him to show that the case falls within some exception to the general rule. *The United States* v. *Henry*, 29

2. In an indictment under the 42d section of the Internal Revenue Act of July 13th, 1866 (14 *Stat. at Large*, p. 162), for executing a fraudulent bond, it is not necessary to set out the particulars in which the bond is fraudulent, or the particular manner in which the payment of the tax was evaded, or in which the bond was used, or attempted to be used, in fraud of the revenue law, or in which the accused executed the bond or procured it to be executed, or connived at its execution. *Id.*

3. Where an answer contained allegations which were inconsistent, but it had not been excepted to, and the case went to trial:
Held, That the Court must take that allegation which operated most strongly against the claimants, to be the one really made. *The Bark Olbers*, 148

4. Where a libel was filed by the consignee named in a bill of lading, to recover damages for non-delivery of the goods, and the libel contained no averment that the libellant was the owner of the goods, and the answer set up that the goods were delivered, but did not allege that the libellant was not the owner of them, or contain any exception to the libel for not averring ownership in the libellant:
Held, That, on these pleadings, the point that the libellant was not the real owner of the goods, must be taken as having been waived. *The Ville de Paris*, 276

5. On a petition by an assignee in bankruptcy, seeking to set aside transfers of property by the bankrupt:
Held, That the objection that the relief sought must be obtained by bill, instead of on petition, was one which could be waived, and must be held to have been waived, if not taken by pleading. *Ulrich's Case*, 355

6. Where a petition in involuntary bankruptcy averred that the petitioner and the alleged bankrupt had been partners; that the partnership had been dissolved, but no settlement had been made between them, and that the alleged bankrupt was indebted to the petitioner "by reason of such partnership transactions for assets and money of said copartnership," which had come into his hands above his share:
Held, That the allegation was insufficient, and that the petitioner was not entitled to an adjudication upon the facts stated. *Sigsby* v. *Willis*, 371

7. Under the 24th section of the Act of March 2d, 1799, (1 *Stats. at Large*, p. 646), which enacts that if goods imported in a vessel of the United States are not entered on the ship's manifest, the master shall forfeit and pay a sum equal to their value, and the 8th section of the Act of July 18th, 1866, (14 *Stats. at Large*, p. 180), which provides that where a vessel or her owner or master are subject to a penalty for a violation of the Revenue Laws, "such vessel shall be holden for the payment of such penalty, and may be proceeded against summarily, by libel, to recover such penalty, in any District Court of the United States having jurisdiction of the offence," it is not necessary, in a libel filed against a vessel to recover such a penalty, to aver any prior seizure of the ship. *The Missouri*, 508

POWER OF THE COURT.

1. A court of the United States has authority, in a criminal case, to discharge a jury from giving a verdict, whenever, taking all the circumstances into consideration, there is a manifest necessity for the act, or where the ends of public justice would otherwise be defeated; and it may do this without the consent of the defendant. *The United States* v. *Watson*, 1

2. Courts of the United States cannot be called upon to redeem pledges of protection which have been given to

criminals by the Executive Department. Such pledges must be redeemed by the Executive Department. *The United States* v. *Blaisdell*, 132

3. Under the 3d section of the Act of March 3d, 1863, (13 *Stat. at Large*, 500,) a Court of the United States has no right to order a person who is sentenced to imprisonment for a period of one year or less, to be confined in any particular State prison or penitentiary. *De Puy's Case*, 307

See EVIDENCE, 9.
PRACTICE (BANKRUPTCY), 19.

PRACTICE (ADMIRALTY).

1. Where goods were seized as smuggled, and a libel was filed without delay to forfeit them and a claim was put in by an agent of the owner of the goods, who applied for an appraisement of the property and its delivery to him on bond:

Held, That the 89th section of the Act of 1799, (1 *Stat. at Large*, p. 695,) applies only to seizures for violations of that Act;

That a delivery on bail in this case was a matter of discretion, and that, as there had been no delay in the prosecution and the goods were not perishable, the application to bond must be refused. *Fifteen Pieces of Black Silk*, 189

2. Where several libels had been filed against a vessel, to recover amounts exceeding her value, and her owners applied to have her discharged on their giving one stipulation in the amount of her value:

Held, That the amount of the freight was not to be included in the stipulation. *The Vivid*, 397

3. The proper form of stipulation to be given for the discharge of a party arrested in a suit in Admiralty, is for the appearance of the party to abide by the decree of the Court in the cause, and not for the payment of the sum decreed. *Grace* v. *Evans*, 479

4. Where a warrant of arrest was issued, with a clause directing the marshal, if the respondent could not be found, to attach his property, and the marshal returned that he had arrested the respondent, and had attached his property:

Held, That the attachment must be set aside. *Grace* v. *Evans*, 479

5. Process being issued, with an attachment clause, the marshal attached property of the respondents, but afterwards discharged it from custody, without any order of Court, and served the process upon them personally. On the return of the process, a default was taken against them, which they moved to open. The libellant insisted that, as a condition of opening the default, they should be required to give security, as on a discharge of property attached:

Held, That, under the circumstances of the case, the condition was a reasonable one, and that the default would be opened, without costs, on the respondents executing such a stipulation. *Van Winkle* v. *Jarvis*, 573

See SALVAGE, 1.

PRACTICE. (BANKRUPTCY.)

1. The fact that one creditor of a bankrupt has examined him under the 26th section of the Bankruptcy Act is no reason for withholding the same privilege from another creditor. But the Register must regulate the examination so as to protect the bankrupt. *Adams' case*, 7

2. Under the 21st section of the Bankruptcy Act, any action to recover a provable debt is to be stayed until a determination is had as to the discharge, whether the debt be one that will or will not be discharged. *Myron Rosenberg's case*, 14

3. Where a bankrupt, who filed his petition in the Southern District of New York, in December, 1867, was a member of a firm engaged in manufacturing cloths in New Jersey, which failed in October, 1866, and, for six months before the filing of the petition, he had resided in New Jersey, but had a desk in the office of his son in New York city, where he received and wrote letters, and kept books and papers, and was engaged in closing up the affairs of the concern, but did no

other business and had no other place of business:

Held, That his petition was not properly filed in the Southern District, and the court had no jurisdiction to grant a discharge. *Little's case*, 25

4. The proceedings before a register, in bankruptcy cases, are under the control of the register, and should proceed without unnecessary delay. No inflexible rule can be laid down as to postponements or adjournments. *Hyman's case*, 28

5. Where, on the return of an order to show cause why a bankrupt should not be discharged, creditors, who had proved their debts, appeared and claimed time to file specifications of objection, and objected to the bankrupt's taking the final oath, and to the register's giving a certificate of conformity:

Held, That the oath required by section 29 of the Bankruptcy Act must be taken and produced to the Register, and he must then certify conformity or non-conformity;

That, if specifications in opposition were filed, the certificate of conformity should be that the bankrupt had conformed, except in the particulars covered by the specifications. *Pulver's case*, 65

6. Where, at the first meeting of a bankrupt's creditors, but one creditor appeared, and he proved his debt, and elected as assignee a person who was present, and it appeared that this person was a stranger to the creditor, and had informed him of the meeting, and solicited the creditor's vote for himself as assignee:

Held, That the election of an assignee under such circumstances could not be sanctioned. *A. B.'s case*, 66

7. A register in bankruptcy has power to make an order directing an assignee in bankruptcy to pay fees of officers of court out of moneys in his hands. *Lane's case*, 98

8. Where, after a bankrupt had taken the oath required by the 29th section of the Bankruptcy Act, a creditor filed specifications of opposition to his discharge, alleging, among other things, wilful false swearing in the affidavits annexed to the petition and schedules, and afterwards withdrew his appearance in opposition and the specifications:

Held, That the oath of the bankrupt, under that section, ought to be taken anew, after such withdrawal. *Machado's case*, 131

9. Where members of a firm had been adjudged bankrupt, and a creditor proved a claim against them separately and not against the firm, the foundation of the claim being a bond made by the bankrupts, "composing the firm of E. & D. Bigelow & Co.," in which they bound themselves, "jointly and severally," the assets of the partnership not being sufficient to pay the partnership debts, but the assets of one of the partners being sufficient to pay all his separate debts in full:

Held, That the creditor was entitled to dividends upon his debt out of the several assets of the individual bankrupts. *Bigelow's case*, 146

10. Counsel fees for attending on behalf of a bankrupt, and opposing proceedings in involuntary bankruptcy, and for drawing inventories and schedules required to be made and filed under the order of adjudication of bankruptcy, are not proper charges against the estate in the hands of the assignee. *Id.*

11. Where, on a petition filed by an assignee in bankruptcy against one W., an injunction had been issued out of this Court against him, restraining him from parting with any property that had come into his possession from the bankrupts during the four months preceding the adjudication of bankruptcy, and thereafter, on a summons issued at the instance of opposing creditors in the bankruptcy proceedings, W. attended as a witness before the Register, and was sworn and claimed the right to be attended by counsel on such examination, and the bankrupts objected to his being examined at all, on the ground that he had been made a party to the bankruptcy proceedings:

Held, That the objection taken by the bankrupts to the examination was not well taken;

That, under the decision in *Fredenberg's* case, (2 *Ben. R.*, 133,) the witness was not entitled to be represented by counsel. *Feinberg, Steenbock and Pessel's Case,* 162

12. Where, on the examination of the bankrupt, a certain lease appeared to be the property of the bankrupt, which was not mentioned in the schedules attached to the bankrupt's petition, and he thereupon applied for leave to amend the schedules in that particular:

Held, That the application for leave to amend was an *ex-parte* one, which no creditor had any right to oppose;

That the allowance of such an amendment could not conclude any creditor from availing himself of any ground of opposition to the discharge which he would have had if the amendment had not been allowed. *Watts' Case,* 166

13. If a bankrupt dies during the bankruptcy proceedings, so that he cannot comply with section 29 of the bankruptcy Act, a discharge cannot be granted to such bankrupt, notwithstanding the provision of section 12 of the Act, that, "if the debtor dies after the issuing of the warrant, the proceedings may be continued and concluded in like manner as if he had lived." *O'Farrell's Case,* 191

14. Where several suits had been commenced in a State Court against S., in which attachments had been issued and levied upon his property, and thereupon another creditor filed a petition in the Bankruptcy Court, procured a warrant to the marshal, and procured injunctions staying proceedings in the State Court suits, and thereupon S. was adjudged a bankrupt without opposition, and the property was secured by the assignee:

Held, That the reasonable expenses of the creditors for such proceedings ought to be paid out of the fund, and that authority for the Court to direct such payment was to be found in the 1st section of the bankruptcy Act.

That a reference would ordinarily be ordered to ascertain the proper amount of such expenses. *Schwab's Case,* 231

15. On objection taken by a creditor to a proof of debt filed in bankruptcy proceedings, the order to show cause why the proof of debt should not be vacated must be made by the Court, and not by a Register. *Comstock and Wheeler's Case,* 236

16. Where an order was made by a Register requiring the attendance of a bankrupt's wife before him, to be examined in relation to the bankruptcy, which order was served on the bankrupt, but not on his wife, and she failed to attend:

Held, That unless the bankrupt should prove, to the satisfaction of the Court, that he was unable to procure her attendance, the Register would not be warranted in certifying conformity, and the bankrupt would not be entitled to his discharge. *Van Tuyl's Case,* 237

17. Where, at the first meeting of the creditors of a bankrupt, one creditor objected to the reception of the votes of other creditors, offering to prove that their votes had been influenced by the bankrupt, and were collusive and fraudulent:

Held, That the register had no power, without the special order of the Court, to inquire into the right of creditors to vote, save for the purpose of postponing the proof of claims until an assignee should be chosen. *Noble's Case.* 332

18. Where, on the return day of a warrant in involuntary bankruptcy, proof was made of the publication of notices to the creditors, but not of the service of such notices, and the bankrupts showed that they had not been able to prepare schedules, and asked for further time, which no one opposed, whereupon the register certified the facts to the Court, and asked that a new warrant be issued:

Held, That the register should have adjourned the meeting of creditors under sections 12 and 42 of the bankruptcy Act, and directed a new notice to be served; but, as he had not done so, the proceedings had fallen through and there must be a new warrant. *Schepeler & Rosenplænter's Case,* 345

19. The bankruptcy Act does not authorize the Court to empower an as-

signee in bankruptcy to compound all doubtful debts, with the consent and approbation of a committee of creditors. *H. E. Dibblee & Co.'s Case*, 354

20. Where, in involuntary bankruptcy proceedings, the attorney for the bankrupt petitioned the Court for the payment of his bill for services in the matter, out of the funds in the hands of the assignee, and the register certified that such services had saved the estate considerable expense, and recommended the payment of the bill:
Held, That, if the assignee should, in writing, approve of the payment, on the grounds set forth, an order would be made allowing the payment. *Montgomery's Case*, 364

21. Where property, which had been mortgaged by the bankrupt in such wise as to constitute the mortgage a valid security as against the assignee, under the 14th section of the bankruptcy Act, was taken, by an assignee of the mortgage, from the possession of the bankrupt, after the appointment of the assignee in bankruptcy:
Held, That from the time of the appointment of the assignee, the possession of the property by the bankrupt was the possession of it by the assignee:
That the taking of it was unlawful, and that it must be restored to the assignee, or, if any part of it was not restored, the parties concerned in taking it must account for its value as of the time when it was taken. *Rosenberg's Case*, 366

22. Where a bankrupt, during the six months previous to filing his petition, carried on business for two months in the Southern District of New York, and, for the same two months, in the District of Massachusetts, and carried on business no where else, during such six months:
Held, That his petition was properly filed in the Southern District of New York. *Foster's Case*, 386

23. Where a bankrupt, having been arrested under an order of arrest issued out of a State Court, during the pendency of the bankruptcy proceedings, is brought before the Bankruptcy Court on *habeas corpus*, that Court cannot go into an inquiry whether, in fact, the debt for which the bankrupt was arrested was one which, under the 33d and 34th sections of the bankruptcy Act, cannot be discharged by the discharge in bankruptcy, but can only inquire whether or not, from the face of the papers on which the State Court acted, in ordering the arrest, it appears that the State Court founded the order on such a debt. *Valk's Case*, 431

24. Questions put to a bankrupt by the assignee in bankruptcy, tending to show that, within a short time after the filing of his petition, he had an amount of money in his possession, which he had not acquired by the transaction of any business subsequent to such filing, are proper. *McBrien's Case*, 481

25. A judgment rendered against a bankrupt, in a State Court, from which he has appealed before the filing of his petition, is conclusive, as against him, to enable the judgment creditors to prove it as a debt in the bankruptcy proceedings. Proceedings by the creditors, on such appeal from the judgment, will be stayed, on motion of the bankrupt, pending the bankruptcy proceedings. *Leszynsky's Case*, 487

26. Where a creditor, who had received property from a bankrupt, in preference over other creditors, contrary to the 39th section of the bankruptcy Act, had surrendered it to the assignee:
Held, That, under the 23d section of the Act, he could prove his debt against the estate. *Montgomery's Case*, 565

27. Where a creditor filed a proof of debt on May 28th, 1869, and in the following October was examined by the assignee, and then applied to amend his proof of debt:
Held, That his application should be granted. *Id.*

PRACTICE (CRIMINAL).

1. Where, after a jury had been empanelled in a criminal case, the trial was postponed to another day by reason

of the illness of the District Attorney of the United States, and of the absence of witnesses for the prosecution, and, on the adjourned day, an application was made by the Assistant District Attorney that the cause go off for the term, on the same grounds as before, and thereupon the court directed a juror to be withdrawn, which was done, and the trial was postponed, (the minutes of the court not showing that the defendants consented to this course,) and, when the indictment was again called, the defendants objected that such proceedings were equivalent to an acquittal:

Held, That the question must be disposed of as it would have been when the application was made to put the cause off for the term, if the defendants had then expressed their dissent from such a course;

That the minutes of the court must be the guide to the court as to what took place on that motion;

That, as it did not appear by the minutes that the defendants consented to the postponement, it must be held that they did not consent;

That, as it did not appear by the minutes that the illness of the District Attorney occurred after the jury had been sworn, or that it was impossible for the Assistant District Attorney to conduct the trial, such illness did not show a manifest necessity for withdrawing a juror;

That, as the minutes did not show that the absence of witnesses was first made known to the law officers of the government after the jury was sworn, or that it occurred under such circumstances as to create a manifest necessity for withdrawing a juror, the position of the case entitled the defendants to a verdict of acquittal, when the motion to put the cause off was made;

That the proceedings on the former trial were equivalent to an acquittal, and the defendants and their bail were entitled to be discharged from all further liability in respect of the indictment. *The United States* v. *Watson*, 1

2. Nothing that is a cause of challenge to a juror before verdict, can be used to set aside a verdict.

Where one of the jurors in a criminal trial was deaf, and the defendant was ignorant of the fact when the jury were empanelled:

Held, That this was no cause for setting aside the verdict. *United States* v. *Baker*, 68

3. Unless the date, stated in an indictment, is of the essence of the crime, it need not be proved as alleged. *The United States* v. *Blaisdell*, 132

4. Where a criminal is convicted of several offences under several counts of an indictment, he may be sentenced under the first count, and sentence may be suspended upon the conviction under the other counts till after the first sentence has been fully executed, *Id.*

PRESUMPTIONS.

See BANKRUPTCY, 6.
NEGLIGENCE.

PRIZE.

See FORFEITURE.

R

RECEIVER.

A bill was filed by an assignee in bankruptcy, to set aside an assignment made by the bankrupts when insolvent, and an injunction was granted, in pursuance of the prayer of the bill, restraining the assignees from, in any manner, interfering with the property covered by the assignment; and it appeared that the property consisted in part of claims against other persons, in part of moneys deposited, in part of moneys loaned on notes secured by merchandise, and in part of other property, and that the assignees had, in pursuance of an order of a State Court, given security for the performance of the trusts of the assignment:

Held, That a receiver should be appointed by this Court, who should take possession of the property, collect all the collectable debts, and sell the merchandise, depositing his collections in the United States Trust Company, as fast as they should reach an amount to be named;

That the plaintiff would be ap-

pointed such receiver. *Sedgwick* v. *Place*, 360

RELEASE.

See SALVAGE,

S

SALE OF VESSEL.

Where a foreign vessel was libelled, to recover for supplies furnished her in New York, and the defence was set up that the lien had been discharged by a subsequent condemnation and sale of the vessel, as unseaworthy, at St. Thomas; and where the only witness called to prove that she was unseaworthy was the claimant, who bought the vessel, and who had taken part in the proceedings as surveyor, and was connected in business with the parties to whom the master consigned the vessel, one of the surveyors on the first survey having signed his report in blank, and refused to be on the subsequent surveys, because he "did not like the looks of things:"

Held, That the sale had not been sustained, and that the vessel was still liable for whatever supplies constituted a lien. *The J. F. Spencer*, 337

SALVAGE.

1. Where a bark picked up, at sea, a derelict schooner, and, putting a crew on board of her, sent her to New York, where she was libelled for salvage, in the name of the master and owners of the bark, for the benefit of all concerned, and the amount of salvage decreed was, in pursuance of an order of court, paid over to the libellant's proctor, and by him to the owners, no order of distribution of the salvage having been entered, and, subsequently, one of the crew petitioned the court that the owners repay into court his share of the salvage, and the owners set up an assignment of the seaman's claim to them, which, it appeared, was executed in a foreign port, at the request of the master, and in ignorance of the facts as to the salvage suit; and also set up a release of the claim, executed by the seaman, after the return of the bark to New York, which was also executed in ignorance of the facts:

Held, That the payment of money out of court, without an order of distribution, was an oversight, as well on the part of the court, as of the proctor;

That the assignment and the release could not avail to deprive the sailor of his share in the salvage, and that a sufficient amount to pay him that share must be repaid by the owners into court. *The Edward Lee*, 114

2. Where a schooner was ashore on the Romer Shoal, and was pulled off in less than two hours' time, by a steam-tug owned by a corporation incorporated for wrecking purposes, which had heard of the situation of the schooner and sent the tug down to her, and which claimed $3,000 salvage for the service, the schooner and her cargo being worth $23,000;

Held, That the libellants were entitled to reasonable compensation for the services rendered;

That the fact that the vessels of the corporation were maintained for wrecking and salvage purposes, at heavy expense, and were often unemployed, was inadmissible as a basis of fixing that compensation;

That $400 should be allowed to the libellants, and, as it had been offered to them and refused, the decree must be without costs. *The J. F. Farlan*, 206

3. A British ship, worth with her cargo $250,000, in attempting to enter the port of New York, at night lost sight of the coast lights in a snow squall. Her port anchor was let go, but the chain parted. Her starboard anchor was then dropped. She dragged some distance, but finally brought up at the edge of the Romer shoal, in 27 feet of water, the tide being high. She drew 19½ feet aft, and, when the tide fell, there was but 21 feet of water under her, and, there being considerable sea on, her stern sometimes thumped heavily. About six o'clock the next morning, a steam-tug, owned by a corporation incorporated for the purpose of wrecking came to her, and a conversation passed between the masters of the two vessels, in which the master of the tug said he would tow the ship off for $1,000, and the master of the ship offered $500. It was finally

agreed that the tug should render assistance, and the amount of compensation should be left to arbitration. The tug then took hold of the ship, and, with the aid of another tug belonging to the same corporation, got the ship off about noon, parting a hawser several times in doing so, and brought her up to New York, arriving there about four o'clock P. M. The wind had shifted from the eastward to south and west about the time the first tug came up. The owners and masters of the two tugs filed a libel against the ship and her cargo, for themselves and all interested, claiming $25,000 salvage. It appeared that the masters and crews of the tugs were employed on fixed rates of compensation, and would receive no share of the recovery:

Held, That the ship was in a condition to be the subject of a salvage service.

That, as the masters and crews were to have no share in the recovery, they must be wholly left out of the case.

That the corporation could not claim as assignee in advance of what might otherwise be the claims of its hired servants for salvage.

That the corporation itself could not be a salvor, what the law recognizes as the main element in a salvage service, namely, the impulse to boldness and heroism, being wholly wanting in the case of a corporation.

That the corporation was entitled to a proper compensation for the use of its two steamers, and of such of the appliances on board as were used in the service, without reference to the value of the ship and her cargo.

That the hazard to the tugs was to be considered in fixing such compensation.

That $1,500 was ample compensation, and, as the claimants had offered, before suit brought, to pay $2,000, no costs would be allowed the libellants. *The Stratton Audley*, 241

4. Where a brig was driven ashore, on the south side of Long Island, and the officers of a corporation in New York city, incorporated for wrecking purposes, heard of the fact, but concealed their knowledge of it, and, not having at hand any tug of their own, chartered another tug at $12 per hour, without telling her owners the service for which she was required, and sent their agents on her to the brig, and they were unable to get her off by the means which they then had, and had to send for another tug belonging to the corporation, and, after her arrival, got the brig off, and brought her to New York, and libels were filed, both by the corporation and by the owners of the chartered tug, to recover for salvage:

Held, That the corporation should be awarded compensation for the use of their own tug at the rate of $15 an hour, and that the owners of the chartered tug should be awarded compensation at the rate of $12 an hour;

That the conduct of the superintendent of the company, in concealing the fact of the brig's being ashore, was to be reprehended. *The Birdie and her Cargo*, 273

5. A steamboat had been dismantled, and stripped of her boiler, engine, and paddle-wheels, and fitted up as a saloon and hotel, and used as such for some months, and was being towed to another place, to be there used in a similar way, and, while so being towed, got ashore, and it was necessary to lighten her by pumping, and a steam propeller was employed for that purpose, whose owner afterwards filed a libel against the hulk, to recover compensation for such pumping, as a salvage service:

Held, That the hulk was not, at the time, engaged in commerce and navigation, in such a sense as to be liable *in rem*, in admiralty;

Whether it would be liable for a tort or injury committed by it, *quere*;

That the libel must be dismissed, for want of jurisdiction, without costs. *The Hendrick Hudson*, 419

SEAMEN'S WAGES.

1. Where an engineer was hired to serve on board of a steamboat by a man who appeared to have full control of her other business, and who did not state that he was an agent:

Held, That the engineer had the right to regard him as principal, and could hold him personally for his wages:

That any loss sustained by the vessel or her owners in consequence of the engineer's leaving the boat, could not be set up by such hirer as a defence against a suit for wages. *Farrell* v. *Campbell*, 8

STALE CLAIM.

Where a libel was filed on March 31st, 1866, against the owners of a steamtug, to recover damages for the sinking of a schooner by her on December 28th, 1869, the tug having been for more than a year after the collision within the district, and her owners having been residents of the district, or carrying on business therein, and no excuse having been shown for the delay of six years and a quarter in commencing the suit:

Held, That the claim was barred by its staleness. *Smith* v. *Sturges*, 330

SEAWORTHINESS.

A vessel equipped in a manner which renders her competent to encounter the ordinary perils of a voyage is seaworthy. 800 *bales of Cotton*, 42

See EVIDENCE, 3.
NEGLIGENCE.
SALE OF VESSEL.

SENTENCE.

See PRACTICE (CRIMINAL), 4.
POWER OF THE COURT, 3.

SET-OFF.

See COSTS, 3.

SMUGGLING.

See PRACTICE (ADMIRALTY), 1.

STATUTE (CONSTRUCTION OF).

1. Where the accused was convicted, under an indictment charging him with aiding and assisting in the making of a plate to be used in printing national currency bank notes, and it appeared that the 11th section of the Act, under which he was indicted, did not in terms speak of plates for printing national currency, but that the 18th section of the Act (13 *U. S. Stat., p.* 218), provided "That the words 'obligation or other security of the United States,' used in this Act, shall be held to include * * * national currency;" but the phrase "obligation or other security of the United States" nowhere appeared in the Act:

Held, That the 18th section referred to the words used separately, and not as a phrase, and that the quotation marks must be disregarded;

That, inasmuch as the 11th section of the Act used the word "obligation," that word must be held to include national currency, and the accused was rightly convicted. *The U. S.* v. *Rossvally*, 157

2. A statute will not be construed to be retroactive, unless the intention that it shall be so appears on its face. When such intention appears, it will be allowed to act retroactively, unless some vested right will be impaired, or some contract violated thereby. *Billing's case*, 212

3. All the words of a statute must be construed in such manner as to give them force and effect. *H. E. Dibblee & Co.'s case*, 283

4. A statute must be so construed, if possible, without doing violence to language, as to give force and meaning and effect to every part of it. *Davis' case*, 482

T

TRADESMAN.

See BANKRUPTCY, 2, 12.

TREASURY REGULATIONS.

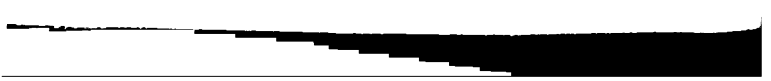
See COSTS, 5.

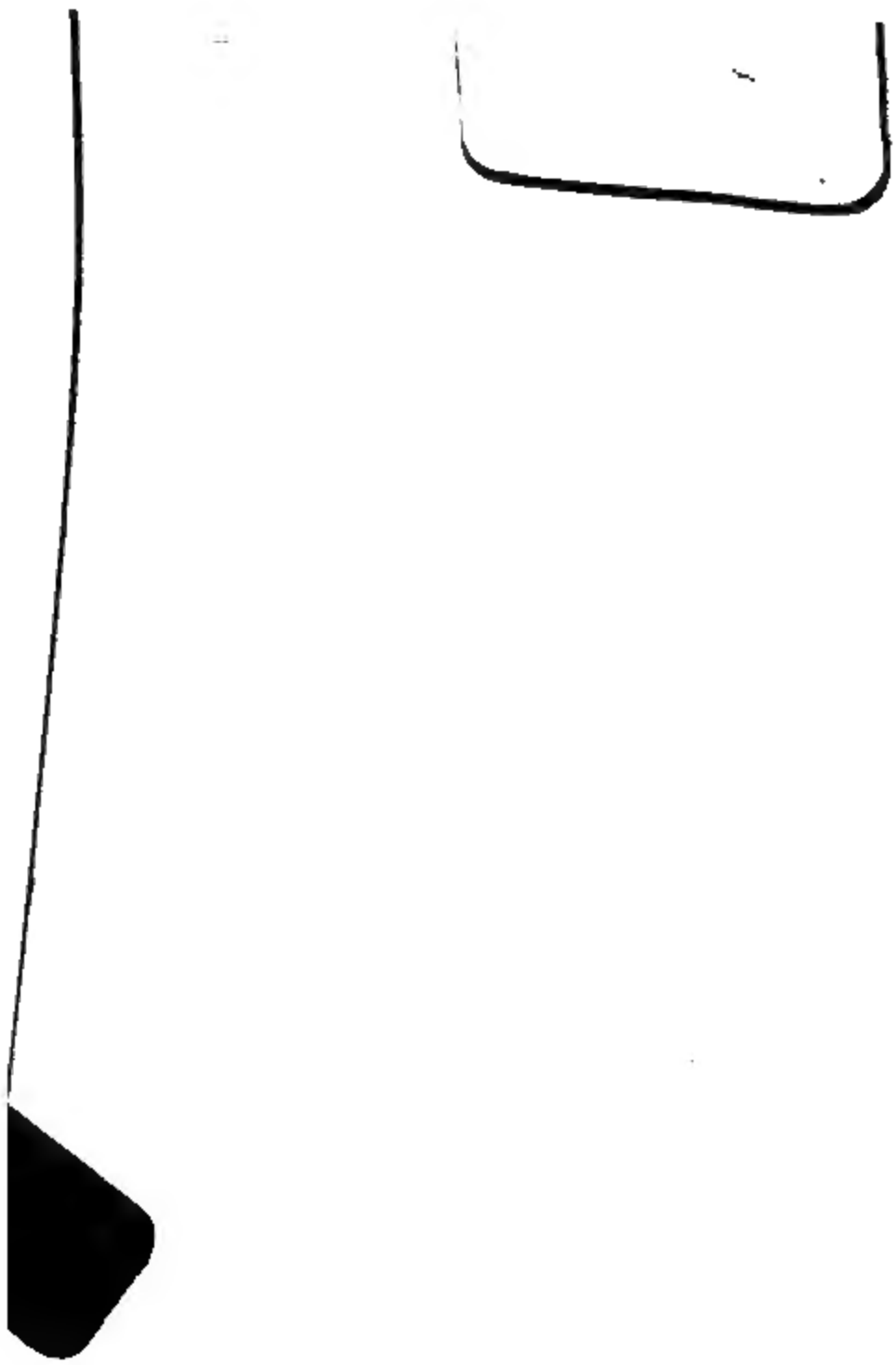
TRIAL.

See PRACTICE (CRIMINAL), 1, 2.

TOW-BOAT AND TOW.

1. Boats in tow, and exclusively under the control of a steam tug, are, as respects other vessels, to be considered vessels under steam *The Pennsylvania*, 215





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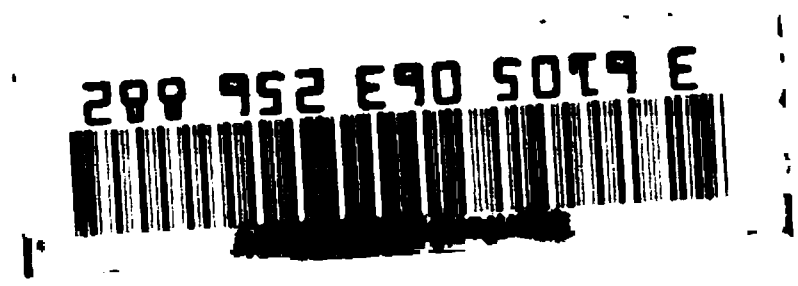
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